SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Southern District of New York	2	1
Indictment	2	1
Judgment and commitment	20	8
Bill of exceptions	22	9
Caption and appearances	22	9
Colloquy in Chambers between Court and Counsel	1234	9
Arguments interjected during Government's summation	1463	10
Government's exhibits:		
85—Examination of Samuel H. Feldman in Supplementary Proceedings in re 58–59 Realty Corp. v. Sam Feldman, March 31, 1936	1578	12
95—Examination of Samuel H. Feldman in Supplementary Proceedings in re Moyer v. Feldman, Dec. 16, 1938 and July 20, 1939.	1588	13
95-A—Examination of Samuel H. Feldman in Supplementary Proceedings in re Moyer v. Feldman, Oct. 6, 1938	1597	21
95-B—Examination of Samuel H. Feldman in Supplementary Proceedings in re Moyer v. Feldman, Sept. 29, 1939	1604	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1943.

	Original	Print
Record from D. C. U. S., Southern District of New York—Continued		
Bill of exceptions—Continued		
Government's exhibits—Continued		
100—Examination of Sam Feldman in Supplementary Proceedings in re Hearst Hotels Corp. v. Feldman, Oct. 28, 1936	1613	31
101—Examination of Sam Feldman in Supplementary Proceedings in re Hearst Hotels Corp. v. Feldman, Sept. 6, 1939	1616	33
102-A—Excerpts from Pages 12 and 46 of Examination of Samuel H. Feldman in Supplementary Proceedings, April 13, 1937 and June 11, 1937	1620	36
102-B—Excerpts from Pages 40 to 42 of Examination of Samuel H. Feldman in Supplementary Proceedings, June 11, 1937	1621	36
102-C—Excerpts from Pages 26 to 36 of Examination of Samuel H. Feldman in Supplementary Proceedings, June 11, 1937	1622	37
102-D—Excerpts from Pages 69 and 70 of Examination of Samuel H. Feldman in Supplementary Proceedings, July 9, 1937	1627	42
102-E—Excerpts from Pages 71 to 73 of Examination of Samuel H. Feldman in Supplementary Proceedings, July 9, 1937	1628	42
Notice of appeal	1640	43
Grounds of appeal	1641	44
Assignments of error	1647	44
Proceedings in U. S. C. C. A., Second Circuit	1665	46
Opinion, Swan, J.	1665	46
Dissenting opinion, Clark, J.	1675	56
Judgment	1678	59
Clerk's certificate (omitted in printing)	1680	
Order allowing certiorari	1681	62

[fols. 1-2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDICTMENT—Filed August 20, 1940

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, from on or about the 1st day of July, 1936, and continuously thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, Samuel H. Feldman, hereinafter referred to as the defendant, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud two classes of persons, both of which are hereinafter sometimes referred to as the "persons to be defrauded", the first of said [fol. 3] classes being too numerous to mention specifically herein, and being made up of persons, firms, corporations, banks and trust companies, who would give moneys, funds, property, credit and capital in exchange for checks and drafts which they would receive from defendant as herein indicated, among whom were the 58-59 Realty Corporation, hereinafter referred to as the Essex House, The National City Bank of New York, the Chemical Bank & Trust Company, the Bank of the Manhattan Company, Fenner & Beane, Harriman & Keech, H. Hentz & Co., Munds, Winslow & Potter and William Erb; and the second of said classes being those who would sign checks in blank and deliver the same to said defendant, among whom were one Edwin S. Reynolds and other persons to the Grand Jurors unknown, said scheme and artifice to defraud being carried out by the means and in the manner hereinafter described.

(1) It was a part of said scheme and artifice to defraud that in or about August, 1936, defendant would open and cause to be opened a bank account in the First National Bank, Petoskey, Michigan, in the name of J. Feldman, said bank being hereinafter sometimes referred to as the "Petoskey Bank".

(2) It was further a part of said scheme and artifice to defraud that from time to time throughout the period set forth in this indictment defendant would obtain and have in his possession numerous blank checks upon said Petoskey Bank, signed "J. Feldman" and blank checks upon other banks and trust companies signed by other persons to the Grand Jurors unknown, and would insert the names of payees and amounts in said checks.

[fol. 4] (3) It was further a part of said scheme and artifice to defraud that throughout the period set forth in this indictment defendant would cash and cause to be cashed by presenting and causing to be presented to the Essex House, the National City Bank of New York, and to others to the Grand Jurors unknown, checks drawn on said Petoskey Bank signed "J. Feldman", knowing at the time that said checks were presented that there were insufficient funds on deposit in the J. Feldman account at the Petoskey Bank to pay said checks, and knowing at such times that he and J. Feldman were without funds or power to pay said checks when the same would be presented for payment.

(4) It was further a part of said scheme and artifice to defraud that defendant would cause said checks drawn on the J. Feldman account at the Petoskey Bank to be forwarded by mail to the Federal Reserve Bank, Chicago, Illinois, and from there by mail to the Petoskey Bank, defendant well knowing that it would take approximately four days for said checks to be transmitted in said manner from New York City to the Petoskey Bank.

(5) It was further a part of said scheme and artifice to defraud that defendant would almost daily throughout the period of time set forth in this indictment cash by presenting and causing to be presented at the Essex House, National City Bank of New York, and to the persons to be defrauded, additional checks in increasing sizes and would send and cause to be sent through the Western Union Telegraph Company to Petoskey, Michigan, certain of the proceeds of said additional checks to meet and pay checks previously drawn on said J. Feldman account in the [fol. 5] Petoskey Bank and previously cashed by defendant.

(6) It was further a part of said scheme and artifice to defraud that in order to obtain funds to pay certain of the

aforesaid checks drawn on the J. Feldman account in the Petoskey Bank which checks were protested and returned by said bank, defendant would secure additional bank checks signed "E. S. Reynolds", drawn on the Winters National Bank & Trust Company, Dayton, Ohio, hereinafter referred to as the Winters Bank, and would insert the amounts and the names of the payees and would cash said additional checks by presenting and causing the same to be presented to certain of the persons to be defrauded, knowing at all of said times that there were insufficient funds in said account of E. S. Reynolds in said Winters Bank to pay said additional checks, and knowing that he and E. S. Reynolds were without sufficient funds and power to pay said additional checks when the same would be presented for payment.

(7) It was further a part of said scheme and artifice to defraud that defendant by presenting and causing to be presented to the persons to be defrauded the aforesaid checks, drawn on the J. Feldman account in the Petoskey Bank, and the checks drawn on the E. S. Reynolds account in the Winters Bank, and by immediately cashing the same, or drawing cash against the same, would represent to the persons to be defrauded that there were sufficient funds to meet and pay said checks in said accounts, whereas in truth and in fact, said defendant then and there well knew that there were at all times set forth in this indictment insufficient funds on deposit in said accounts to pay said checks, [fol. 6] and said defendant intended by such false and fraudulent representations, pretenses and promises to deceive and defraud the persons to be defrauded, and to induce them to part with their moneys and funds, it being the plan and purpose of said defendant to obtain said moneys and funds of said persons to be defrauded, and to convert and appropriate the same to his own profit and use in proportions to the Grand Jurors unknown.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore, to wit, on or about the 20th day of August, 1937, in the Borough of Manhattan, in the City, State and Southern District of New York and within the jurisdiction of this Court, Samuel H. Feldman, the defendant herein, unlawfully, wilfully and knowingly did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the

Post Office Establishment of the United States, a certain check drawn to the order of Essex House, signed "J. Feldman", in the amount of $2,000, dated August 19, 1937, and enclosed in a postpaid envelope, addressed to: Federal Reserve Bank, Chicago, Illinois, a fuller and more complete description of said envelope being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

[fol. 7] Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if [fol. 8] herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 21st day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "J. Feldman" on the First National Bank, Petoskey, Michigan, made payable to the order of "Essex House" in the amount of $2000.00, dated August 20, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Chicago, Illinois: against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

. . . . . .

[fol. 9] Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the

first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that for the purpose of executing said scheme and artifice to defraud and attempting so to [fol. 10] do, the defendant, at the City, County, State and Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of August, 1937, unlawfully, wilfully and knowingly did take and receive from the mail delivered by the Post Office Establishment of the United States, certain ten checks drawn on the Winters National Bank and Trust Co., Dayton, Ohio, and signed in blank "E. S. Reynolds" and enclosed in a postpaid envelope addressed to: Mr. Sam Feldman, Essex House, 59th Street, New York City; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 18, Section 338, United States Code).

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 25th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, [fol. 11] wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on The Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in the amount of $10,000.00, dated August 24, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 27th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and [fol. 12] delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on The Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in the amount of $10,000.00, dated August 27th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 26th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds"

[fol. 13] on The Winters National Bank & Trust Co. made payable to the order of "Sam Feldman" in the amount of $6000.00, dated August 25th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank of Cleveland, Cincinnati Branch, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 28th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on the Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in [fols. 14-19] the amount of $6000.00 dated August 26th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank of Cleveland, Cincinnati Branch, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

John T. Cahill, United States Attorney.

[fol. 20] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

SAMUEL H. FELDMAN

C. 108/159. Violation of U.S.C. Title 18 Secs. 338. Using the mails in a scheme to defraud.

JUDGMENT AND COMMITMENT

On this 9th day of July 1942, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of five years on each of counts 1-3-5-6-8 to run concurrently with each other.

Five years each on counts 7 and 9. Execution of sentence on counts 7 and 9 suspended. Probation for five years on counts 7 and 9 to begin after service of sentence on counts 1-3-5-6-8, subject to the standing probation order of this court.

[fol. 21] It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Bascom S. Deaver, United States District Judge.
(Seal.)

A true copy. Certified this 9th day of July 1942.
George S. Tollmen, Clerk.

[fols. 22-1233] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C. 108-159

UNITED STATES OF AMERICA

vs.

SAMUEL H. FELDMAN

Bill of Exceptions

Before Hon. Bascom S. Deaver, D. J., and a Jury

New York, June 22, 1942; 10:30 a. m.

APPEARANCES:

Mathias F. Correa, Esq., United States Attorney, for the Government; Walter H. Gahagan, Jr., Esq., and Amedeo L. Lauritano, Esq., of Counsel.

Seymour M. Klein, Esq., Attorney for Defendant; Ruth Rosenthal, Esq., of Counsel.

* * * * * * *

[fols. 1234-1462] New York, July 6, 1942; 9:30 a. m.

Trial Resumed

COLLOQUY IN CHAMBERS BETWEEN COURT AND COUNSEL

(The following occurred in chambers between Court and Counsel out of the presence of the jury.)

Mr. Klein: I would like to object to the admission of the Government's exhibits, some of which have been marked and some of which have not been marked, which the Government is about to offer in evidence, consisting of the supplementary proceedings in which Mr. Feldman was examined as a judgment debtor at various times.

I would like to object to their admission on the ground that they are incompetent, irrelevant and immaterial, not within the scope of this indictment and not binding on the defendant, and are also a violation of the defendant's constitutional rights in that the examination was compulsory.

I would also like to point out in addition to my objection which I have just mentioned—

The Court: I might say with reference to your objection to the papers as a whole that the objection is overruled because some of it is admissible, and there may be some that is not. You may point out any special points you want to object to specially.

Mr. Klein: I understand that your Honor is ruling on the general admissibility of these examinations as a whole, and my objection goes to the whole?

The Court: Yes; that is right.

* * * * * * *

[fol. 1463] ARGUMENTS INTERJECTED DURING GOVERNMENT'S SUMMATION

(Mr. Gahagan continued his summation, during the course of which the following occurred:)

"You are making me look like a burglar."

Mr. Klein: Now may the record show the exact portion which Mr. Gahagan read to the jury.

Mr. Gahagan: Exhibit 102-D.

Mr. Klein: Mr. Stenographer, when you have time would you mind just copying that part read into the record.

Mr. Gahagan: Make it all of Exhibit 102-D.

[fol. 1464] Mr. Klein: No, you didn't. I am talking about the stress being laid on this portion. I am talking about the part starting with the words "It is the same kind of checks" down to the word "burglar." I object to that and I move your Honor to strike it out of the record.

The Court: Motion denied.

Mr. Klein: Exception, please. Thank you.

(The portion referred to by Mr. Klein above is as follows:

"Q. It is the same kind of checks that you have been kiting?

"A. I object to that.

"Q. Didn't you use the word 'kiting'? Didn't you yourself use the word?

"A. That is the real term for it, but I don't recall using the word. If that is what you want, all right. You should not be so nasty. You are making me look like a burglar.")

(Mr. Gahagan continued his summation, during the course of which the following occurred:)

There is no question about it; he has a right to refuse to answer. That is the law.

Mr. Klein: I object to that. The District Attorney is misstating the law of the State of New York. This man has to testify in supplementary proceedings.

The Court: Let us not have any misunderstanding about that and may I say just to prevent such a misunderstanding that sometimes you refer to the law of New York and sometimes to the Federal Constitution. Now your point is, I take it, that use of the supplementary proceedings during the trial would be in violation of the Federal Constitution. What the District Attorney is saying applies to the Federal [fol. 1465] Constitution, and what he says is that he has a right under the Federal Constitution not to answer. Then it would be immaterial what the State Law or what the State Constitution has to say about it.

Mr. Klein: The District Attorney is inferring that this man could have refused to answer questions before the Supreme Court of the State of New York.

The Court: Absolutely, if you are correct about having a Federal constitutional right. If you are correct he could absolutely before any court or anywhere else in the whole United States claim his privilege and refuse to answer.

Mr. Klein: I ask your Honor to charge—but first I except to your Honor's statement—that under the laws of the State of New York this man would have to answer questions in the State of New York courts and that he would have no choice.

The Court: I think I have made it clear to the jury that so far as the law of the State of New York is concerned it may require him to answer, but the Federal Constitution is controlling. The Federal Constitution is controlling over all State laws and if there were a right under the Federal Constitution not to answer these questions then he could refuse to answer not on the ground that the New York Law does not force him to do it but on the ground that the Federal Constitution gives him a right not to answer.

Mr. Klein: Just to make my point clear, sir, I except to your Honor's statement upon the ground that the District Attorney has tried to infer here that under the Federal Constitution this man could refuse to answer questions in

the State of New York; whereas under the statute of the [fols. 1466-1577] State of New York this man must answer the questions and that testimony may not be used against him. And I ask your Honor to so state in view of what your Honor's statements have been.

The Court: No, I state to the contrary, that if there were a Federal right under the Federal Constitution not to answer he would not be required to answer anywhere.

Mr. Klein: Even in the State of New York?

The Court: Anywhere.

Mr. Klein: I respectfully except.

* * * * * * *

[fol. 1578] GOVERNMENT'S EXHIBIT 85

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

58-59 REALTY CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor

SAMUEL HARRY FELDMAN appearing this 31st day of March, 1936 for examination in proceedings supplementary to execution pursuant to subpoena heretofore served upon him, first being duly sworn true answers to make to all questions put to him, testifies as follows:

Examination by Mr. A. Edward Moskowitz, Attorney for Judgment Creditor:

Q. What is your full name? Samuel Harry Feldman.

Q. Where do you reside? At the Hotel Navarre, 112 Central Park South.

Q. Are you employed? No.

Q. Do you have a business of your own? No.

Q. Do you have a safe deposit vault? No.

Q. Have you a bank account, savings or checking? Yes, a personal checking account.

Q. In what bank? Emmet County State Bank.

Q. What is your balance? About $6.00.

[fol. 1579] Q. Has it been any higher than that in the last year? No.

Q. Have you made any deposits? Yes, by mail and withdrawals made at the same time.

Q. How much rent do you pay? $225.00 per month.

Q. You have an independent income? None.

Q. Do you pay this rent yourself? I do.

Q. Where do you receive the money from? From my family.

Q. Where does your family live? Petoskey, Michigan.

Q. What is your father's name? Joe Feldman.

Q. He sends you money to pay your rent? I get it from many members of my family.

Q. They all reside outside of New York? They live in different states, nobody in New York.

Q. Do you own any stocks, bonds or securities? None.

Q. Are you an officer or director of any corporation? No.

Q. Member of any lodges? Yes, Elks, K. P., Masons, American Legion and Shriners.

Q. Are your dues all paid? No, I haven't paid dues for five years.

Q. Member of any of the clubs in the City? None.

Q. When were you last employed? Never been employed.

Q. When did you last earn any money? 3½ months ago.

Q. Are there any other judgments against you? Many.

Q. How much is the total amount? $150,000.

Q. Have you ever filed a petition in bankruptcy? Never.

Q. Have you paid off on any of these judgments? I [fols. 1580-1587] have made settlements of a lot of them in the past few years, none by payments.

Q. Have you any money with which to pay this judgment? No.

Q. Do you expect to be employed now? No.

Q. When you make any money, in what manner do you earn it? Selling furs as commission agent.

Sam Harry Feldman.

Sworn to before me this 31st day of March, 1936.

——— ———.

[fol. 1588] GOVERNMENT'S EXHIBIT 95

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 16th day of December, 1938, at the office of Shirley Zuckerman, Notary Public, Room

2900, 295 Madison Avenue, New York City. (Same appearances)

By Mr. Nulman:

Q. You have read your prior examination consisting of six typewritten pages, and have made certain changes therein which you have initialed,—is that right?

A. Yes.

Q. And do you swear that those answers are true?

A. Yes.

Q. You have testified previously that the only source of your income is your father, who sends you all the money you require and use for your needs,—is that correct?

A. No, I get great assistance from my father, but I borrow money from some of my family.

* * * * * * *

Q. Is it a fact that you have been subsisting entirely of moneys sent you by your father?

A. Of late, yes.

Q. When you say of late, what period of time does that cover?

A. Within the last year and a half.

Q. Would it be two years?

A. Maybe.

Q. Would it include the entire period when you were resident at the Essex House and Navorro Hotel?

A. No, because I was making money up until about two years ago.

* * * * * * *

Q. But the money you used to pay your expenses at the Navorro Hotel for the past year or so was from your father?

A. Practically.

Q. And that money is given to you by your father,—is [fol. 1589] that correct?

A. I wouldn't say given to me; I hope sometime to be successful and repay him.

Q. Do you ever give your father money of any kind?

A. Nothing.

Q. Have you within the past three or four years sent any money of any kind to your father?

A. I might have helped him out in many years back.

Q. I am talking of the time within the last three or four years.

A. I don't remember.

Q. Within the last two years did you send any money to your father?

A. I don't think so.

Q. Your father sends you money drawn on what bank?

A. First National Bank of Petosky, Michigan.

Q. Do you make any deposits in that bank in your father's account?

A. I do not.

Q. Have you ever made any deposits in that account?

A. Never.

Q. Have you ever sent your father the funds with which to maintain that account?

A. Never.

Q. Can you approximate how much money your father has given you of his own funds in the past year?

A. I should judge three thousand dollars.

Q. In the past year?

A. In the past year, year and a half.

Q. If I were to tell you that the records of your expenditures exceed three thousand dollars, will you change your answer?

A. No. Because many times people in my apartment order up food and give me the money to pay it.

Q. Do you maintain in your own name any brokerage account at the present time, in any brokerage house whatsoever?

A. No.

Q. Do you maintain at the present time any brokerage [fol. 1590] account in any brokerage house whatsoever under any name?

A. None.

Q. Have you a beneficial interest in any brokerage account of any kind whatsoever?

A. I have no account to derive benefit from.

Q. Have you an equity, whether by way of participation or to have somebody act on your behalf, or have you an interest of any kind whatsoever in any brokerage account?

A. None.

Q. Did you ever maintain a brokerage account under any other name but your own?

A. Under the name of Mr. Little.

Q. When was that?

A. About three years ago.

Q. With what house?

A. Harriman & Keech. They are out of business for sometime.

Q. Was that the last brokerage account you were interested in?

A. Yes.

Q. Financially or otherwise?

A. The last account I have ever had.

. . . . . .

Q. Did you, between the last time you were examined by me and today, have any money of any kind?

A. Probably twenty-five or fifty dollars, to live on.

Q. Where did you get it from?

A. My father gave it to me when he was here.

[fol. 1591] Q. Did you spend it?

A. I have been going very carefully. I still have about ten dollars left.

. . . . . .

Sam H. Feldman.

Sworn to before me this 26 day of October, 1939. Charlotte Feinstein, Commissioner of Deeds, City of New York, N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 20th day of July, 1939, at Special Term, Part II, Supreme Court, New York County, at 2:00 P. M. (Same appearances)

By Mr. Nulman:

. . . . . .

Q. When did you return from Florida?

A. About the middle of April.

Q. 1939?

A. 1939.

Q. Where did you stay when you were in Florida?
A. At El Mirasol Apartments.
Q. What is the address?
A. 28th Street.
Q. Where?
A. Miami Beach.
Q. Did you occupy an apartment there?
A. I occupied a room.
Q. And what was the rental?
A. I didn't pay the rent.
[fol. 1592] Q. Was that room part of a suite?
A. It was part of an office.
Q. Whose office was it?
A. Stout & Company.
Q. Where did you sleep?
A. Right in that room.
Q. What sort of a room was that?
A. Just a room with twin beds.
Q. And who paid the rent for that room?
A. It was given to me gratis.
Q. By whom?
A. By Stout & Company.
Q. Who in Stout & Company gave that?
A. The firm.
Q. Who?
A. Mr. Hutton Miller and Mr. Goetz.
Q. What is the address of this firm?
A. El Mirasol Apartments. 28th Street. The two partners have since severed connections.

. . . . . .

Q. Who paid for your meals while you were in Florida?
A. The firm paid all my expenses down there.
Q. Which firm do you refer to?
A. Stout & Company.
Q. Were you employed by them?
A. I was not.
Q. Did you have any arrangement with them under which they paid for your room and board?
A. I was there as a friend of Mr. Miller's.
Q. Mr. Feldman, Do you now either directly or indirectly have any interest in any brokerage accounts of any kind whatsoever?
A. None whatsoever.

Q. Did you at any time prior to today, either directly or indirectly, have any interest of any kind whatsoever in any brokerage account of any other person or corporation?

A. Yes.

. . . . . .

Q. When was the last time that you were interested, either directly or indirectly, in the brokerage account of [fol. 1593] any other person or corporation?

A. About two years ago.

Q. And whose account was that?

A. It was Mr. J. F. Little.

Q. Where does Mr. Little live?

A. On Amsterdam Avenue. You can look in the book, J. L. Little.

Q. Didn't you just say J. F. Little?

A. It's either J. F. or J. L.

Q. What brokerage house was that?

A. I had that account with Harriman & Keech.

Q. What branch?

A. The main branch.

Q. Where?

A. I don't know where they were located.

Q. Where did you have the account?

A. Where I did business with them? At the Savoy Plaza Hotel.

Q. What other stock brokerage houses did you have accounts with?

A. None.

. . . . . .

Q. Were there any other accounts in which you had an equity or interest of any kind whatsoever?

A. Not to my recollection.

. . . . . .

Q. Did you have any business transactions of any kind while you were in Florida from January 1st until you returned to New York City?

A. None whatsoever.

Q. Didn't you just tell Judge Leary a few minutes ago that you went there in the hopes of doing business, selling furs?

A. Yes, but I was unsuccessful. I sold no furs.

Q. Did you have any furs to sell?

A. I had entry to all the furs I could get, if I had customers.

Q. To whom do you have entry?

A. I could go to anybody as long as I got customers.

[fol. 1594] Q. Who specifically could you go to?

A. None particularly. Anybody.

Q. When was the last time that you got money of any kind from anybody?

A. A long time; I don't recall.

Q. About how long ago?

A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year?

A. Outside of help.

Q. What help did you get, when, and from whom?

A. Most of my help was from different members of my family.

. . . . . .

Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan?

A. Not for quite some time.

Q. When was the last time you did that?

A. I should judge within two years.

Q. How long ago was the last time that you did that?

A. I just said I think about two years.

Q. In other words for approximately two years you tell me you have not sent any money to anybody in Petosky?

A. There might have been money sent to Petosky by other people, or maybe I was there and maybe my name was used, but it had nothing to do with me as to moneys I had.

Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account?

A. I think money was sent to Petosky when my father was in the City.

Q. By whom?

A. By J. Feldman: He probably came to the place. [fol. 1595] Maybe it was sent by me, but J. Feldman sent it. He might have put my name on it.

Q. Have you ever within the last two months sent money to the bank in Petosky for deposit with them in the account of J. Feldman?

A. Never.

Q. Do you know of any other person who sent money to the bank at Petosky or to any other person for deposit in the bank at Petosky.

A. No.

Q. What did you mean when you told me that money was sent to the bank?

A. You just asked me a question and I told you that J. Feldman sent money to his own account. Maybe he sold furs and had the money and wanted to wire it. Those things I am not familiar with. You asked me if I sent money, and I said no.

Q. Have you ever asked persons you were doing business with to send money to the bank in Petosky?

A. No.

Q. Have you ever asked people you were doing business with to send money to persons in Petosky?

A. No.

Q. Have you ever sent checks to Petosky?

A. No.

Q. Have you ever sent checks to any person or to any bank in Petosky?

A. Never.

Q. Have you ever caused any checks to be sent to Petosky, Michigan for deposit in the bank at Petosky?

A. No.

. . . . . .

Q. Have you ever cashed a check in New York City drawn on the bank in Petosky, Michigan?

A. Issued by who?

Q. By anybody?

A. Yes

Q. How long ago?

A. I used to cash several checks.

Q. How long ago did you cash the last check?

A. Over two years ago.

[fol. 1596] Q. Have you cashed any checks since that time?
A. Not to my recollection.

* * * * * * *

Examination adjourned.

Sam H. Feldman.

Sworn to before me this 26 day of October, 1939. Charlotte Feinstein, Commissioner of Deeds, City of New York. N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

[fol. 1597] GOVERNMENT'S EXHIBIT 95-A

SUPREME COURT

NEW YORK COUNTY

In the Matter of Supplementary Proceedings

SELMA MOYER, Judgment Creditor,

against

SAMUEL H. FELDMAN, also known as S. H. FELDMAN, Judgment Debtor

Appearances:

Shaine & Weinrib, Attorneys for Plaintiff, Judgment Creditor by Kalman I. Nulman, of Counsel; Paul Grainsky, Attorney for Defendant, Judgment Debtor; Samuel H. Feldman, Judgment Debtor.

It is hereby stipulated by counsel for both parties that the following examination in supplementary proceedings may be taken before Shirley Zuckerman, a Notary Public, with the same force and effect as if taken before the Clerk of the Court, and may be sworn to before a notary public or commissioner of deeds with the same force and effect as if sworn to before the Court.

Examination in supplementary proceedings of Samuel H. Feldman, also known as S. H. Feldman, pursuant to sub-
[fol. 1598] poena therefor duly served upon him, dated September 1st, 1938, and various stipulations of adjourn-

ment, at the office of Shirley Zuckerman, Notary Public, Room 2900, 295 Madison Avenue, New York City, on the 6th day of October, 1938, at 4 P.M. after being duly sworn, testifies as follows:—

Q. Where do you live, Mr. Feldman?

A. Hotel Navarro, 112 Central Park South, New York City.

Q. You are the judgment debtor in this proceeding?

A. Yes.

Q. Are you engaged in business?

A. I am.

Q. What business?

A. Fur business.

Q. Have you a place of business?

A. I make my headquarters in my apartment.

Q. How large an apartment do you have?

A. Two rooms.

Q. What is the monthly rental?

A. $225 a month.

Q. And you pay that?

A. I don't, my father pays it.

Q. Where is your father?

A. In Petosky, Michigan.

Q. How does he pay it?

A. Pays it by his own personal checks. Sends checks to the Hotel directly.

Q. Are the checks made payable to you?

A. They are made payable to me, or to the hotel, or to cash.

Q. He remits monthly?

A. No, sometimes he is not in a position to.

Q. On the average, how often do these payments come in to you from your father?

A. On the average of once or twice a month.

Q. Approximately how much is the average payment?

A. Around $60 a week.

Q. What is your father's full name and address?

A. Joseph Feldman, Hide, fur and wool business, Petosky, Mich.

[fol. 1599] Q. Have you a bank account?

A. I have none.

Q. When did you last have a bank account?

A. About six years ago.

Q. Where did you have your bank account?
A. Harbor Springs, Michigan.
Q. Ever have a bank account in New York?
A. Never.
Q. Ever have a savings account in New York?
A. Never.
Q. Do you now maintain a brokerage account in New York?
A. I have none.
Q. When did you last have a brokerage account?
A. 2½ or 3 years ago.
Q. With whom?
A. Harrison & Keech, Savoy Plaza Hotel Branch, New York City.
Q. Did you ever maintain any other accounts in New York?
A. Not in many years.
Q. Do you have the names of any other brokerage accounts in New York?
A. Yes.
Q. So that outside of this brokerage account you maintained with Harriman & Keech, you had no other brokerage accounts of any kind maintained anywhere in New York City?
A. Yes I did by the name of Little.
Q. When did you come to New York?
A. 15 or 17 years ago, I don't remember which.
Q. What is the nature of your business?
A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.
Q. You are what is called a fur broker?
A. Right.
Q. Who are some of the customers you do business with?
A. Orlan Fur Corp. 27th Street, Fishman & Greenfield, 224 West 30th Street, and A. Walzer & Sons, 330—7th Avenue.
Q. Any others?
A. Not recently.
[fol. 1600] Q. Do you have any outstanding accounts?
A. Nothing.
Q. Are there any moneys due from customers to you?
A. Haven't been able to do any business for eight months.

Q. In other words, do I understand that you haven't been able to do any business for eight months?

A. Right.

Q. Mr. Feldman, when did your father last remit to you?

A. Monday. He remitted to the hotel.

Q. How much did he remit?

A. $500.

Q. Was it by cash or check?

A. Check.

Q. Made payable to whom?

A. Made payable to Navarro Hotel (cash), to the best of my recollection.

Q. Did you cash that check?

A. No, gave them check on account. The Hotel got it.

Q. Was that check mailed to you?

A The check was mailed to the hotel.

Q. By your father?

A. Yes.

Q. Did you at any time see the check?

A. I saw the check and I put the word cash in parenthesis there because they wanted the check payable to cash.

Q. To whom was the check issued?

A. To the Navarro Hotel.

Q. And who at the Navarro Hotel received it?

A. I don't know, it was given right at the desk there.

Q. Who requested you to insert the word cash on the check?

A. One of the clerks.

Q. And you say that at the time you did so the name Navarro Hotel was already inserted?

A. The check was made out to the Navarro Hotel.

Q. Were the words Navarro Hotel in your handwriting?

A. No.

Q. Was there any other writing on that check?

A. The word cash.

[fol. 1601] Q. Outside of the word cash, there was nothing on the check in your handwriting?

A. No.

Q. And it was for $500?

A. Yes.

Q. When was the last check received from your father?

A. I don't remember.

Q. Approximately how long before this last check, did your father remit to you?
A. I don't even know.
Q. Do you know for how much the last check was?
A. No.
Q. You have no idea?
A. The last check I saw was the $500 check Monday.
Q. Do you maintain an account with your father?
A. No.
Q. Do you maintain any staff at your household?
A. No.
Q. Have you ever maintained a staff at your household?
A. No.
Q. Ever employ a cook or maid?
A. No.
Q. Do you employ anybody in your business?
A. No.
Q. Have you ever employed anybody in your business?
A. Never.
Q. When did you last collect any outstanding accounts from your customers?
A. Last December.
Q. From whom and how much?
A. I don't remember.
Q. Do you maintain a set of books?
A. No.

. . . . . .

Q. Have you sold furs to any private individuals within the last year?
A. No.
Q. When was the last time you made a sale of furs to a private individual?
A. Just before I went to Florida.

. . . . . .

[fol. 1602] Q. Do you own an automobile?
A. No.
Q. Have you ever owned one?
A. About 7 or 8 years ago.

. . . . . .

Q. Is there anybody who owes you money?
A. Nobody.

. . . . . .

Q. Are these remittances from your father to you in the nature of commissions earned?

A. Loans.

Q. Do you keep an account of the moneys your father loans you?

A. No.

Q. Did you execute notes to your father for these amounts?

A. No.

Q. Did you request that your father send any specific sums to you?

A. I asked him for plenty, and he sends me what he wants to. Sometimes I don't get any money for two or three months from him.

Q. Have you a lease at the Navarro Hotel?

A. No.

Q. Pay on a month to month basis?

A. Yes.

Q. How much in arrears are you?

A. About six weeks.

Q. You pay weekly?

A. Pay whenever I can.

Q. When you are supposed to pay?

A. Weekly for sundry accounts and monthly for rent.

Q. How much does your sundry account amount to each week?

A. About $15 or $20 a week, (underscoring ours)

Q. So that your total charges at the Navarro Hotel amount to about $300 a month?

A. I should judge about that.

Q. How long have you lived at the Navarro Hotel?

A. About eight months.

[fol. 1603] Q. During that time I assume that the charges have been constant?

A. About the same thing.

Q. In addition to that, you buy your own clothes?

A. No.

Q. You don't?

A. No. I get them in Petoskey, Mich.

Q. How often do you go there?

A. About 3 or 4 times a year.

Q. Do you have any charge accounts in New York?

A. I have none.

Q. Where did you live prior to the time you lived at the Navarro Hotel?
A. Essex House.
Q. How long did you live there?
A. Several years.
Q. How much was the rent there?
A. $225 or $250, it was seasonal.
Q. What was the rent of the apartment?
A. About $225.
Q. What was the maximum rent for the apartment?
A. $250.
Q. You maintained a sundry account there too?
A. Yes.
Q. How much did that amount to?
A. About $30 or $40 a week.
Examination adjourned.

Samuel H. Feldman.

Sworn to before me this 16th day of December, 1938. Charlotte Feinstein, Commissioner of Deeds, City of New York, N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

[fol. 1604] GOVERNMENT'S EXHIBIT 95-B

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 29th day of September, 1939, at Special Term, Part II, Supreme Court, New York County, at 2:00 P. M. (same appearances)

By Mr. Nulman:

* * * * * * *

Q. At any rate, that check and all other checks to the Hotel Novarro were drawn on the bank in Petosky by J. Feldman?
A. Right.
Q. Is he your father?
A. Right.
Q. What is his address?
A. 413 Michigan Avenue, Petosky, Michigan.

Q. And those funds are not your funds, are they?

A. No.

Q. When you say "no", you mean that I am correct that they are not your funds?

A. Absolutely.

Q. Those are your father's funds?

A. Yes.

Q. And every check he sends you represents his own funds?

A. Or money he might get from his own family.

Q. But they are not moneys that you have previously given to him,—is that correct?

A. Correct.

Q. And that is the sole source of your income?

A. At the present time.

Q. You have previously testified it was at all times?

A. I may do something in the future.

Q. I am asking you now, isn't that what your previous testimony was, that each time I interrogated you, you stated that was the sole source of your income?

A. Correct.

Q. So that for the entire duration of this examination, which is approximately a year and a half, or thereabouts, [fol. 1605] that has been the sole source of your income?

A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time.

Q. Isn't it a fact that on each of the prior occasions when you were interrogated by me for this period, that you told me the sole source of your funds was sent by J. Feldman?

A. I don't remember; it's been too long.

Q. When did you last buy clothes?

A. Two years ago.

Q. Where did you buy it?

A. In Petosky.

Q. And that was paid for by your father?

A. Yes.

Q. With checks drawn by him?

A. I don't know how it was paid.

Q. What is the name of the bank in Petosky on which the checks sent by J. Feldman to the Hotel Novarro are drawn?

A. First National Bank.

Q. Is that the First National Bank of Petosky, Michigan?
A. Correct.

* * * * * * *

Q. What was your last transaction, or what was the last transaction you participated in, in any brokerage account?
A. Over two years ago.
Q. What account was that?
A. My own.
Q. Did you maintain that account in your own name?
A. It was my own account, but not in my name.
Q. In whose name was it maintained?
A. J. Feldman.
Q. With whom did you maintain these accounts?
A. With Munz, Winslow & Potter.
Q. Where are they?
A. New York City.
Q. There is no doubt, Mr. Feldman, that the equity in that account was entirely your own?
A. There was never a penny in the account, and it shows an eight thousand dollar loss which still remains on the books.
[fol. 1606] Q. That account was for and on your own behalf, exclusively, was it not?
A. If there were any profits, it would have been mine.
Q. So that no one else had any interest in that account?
A. Correct.
Q. Did you maintain any other accounts in the name of J. Feldman in New York at any time?
A. Never.
Q. What other brokerage accounts did you have at or about that time?
A. None.
Q. What other accounts did you have prior to that time?
A. None.
Q. Outside of this account with Munz, Winslow & Potter, did you have any account at any time in any name?
A. In what years?
Q. Any number of years.
A. Yes, I maintained an account in the name of Joe Little.
Q. With whom did you maintain the account in the name of Joe Little?
A. Munz, Winslow & Potter.

Q. At what time?
A. About three years ago.
Q. What other accounts did you maintain?
A. I had none.

• • • • • • •

Q. Do you maintain now, or have you maintained within the past few years, any safe deposit box in your own or any other name?
A. Never.

• • • • • • •

Q. Have you ever made deposits in the account of J. Feldman in the First National Bank?
A. Never made a deposit.
Q. Have you ever caused a deposit to be made in that account through the medium of another person?
A. Yes.
[fols. 1607-1612] Q. Through whom did you cause these deposits to be made?
A. They were made by the office.
Q. What office?
A. J. Feldman.
Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman in Petosky, by him to be deposited in the account of J. Feldman,—is that correct?
A. Yes.
Q. Isn't it a fact, Mr. Feldman, that your entire income through all these years has been from funds received from the account in Petosky?
A. No.
Q. Hasn't that been substantially the source of all of your funds?
A. I have been borrowing money over a period of eight years from friends.
Q. Have you borrowed any substantial sums from these friends?
A. Small amounts.
Q. Outside of these borrowings in small amounts you have had no other source of income other than the account in Petosky, Michigan?
A. And what money I made on the sale of furs.

Q. What moneys did you make on such sales?
A. I have no record.

. . . . . .

[fol. 1613] GOVERNMENT'S EXHIBIT 100

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of Supplementary Proceedings

HEARST HOTELS CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor.

Parties appear by:

Manheim Rosenzweig, Esq., for Judgment Creditor; William Meyerson, of Counsel. Sam Feldman, Judgment Debtor in person.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, ss:

Direct examination of SAM FELDMAN, judgment debtor in the above entitled proceeding, by judgment creditor's counsel, held the 28th day of October, 1936.

the said SAM FELDMAN, having been duly sworn, testifies as follows:

1. Q. Where do you live?
A. Essex House; 160 Central Park South.
[fol. 1614] 2. Q. How much rent do you pay at the Essex House?
A. $250.00 per month.

. . . . . .

4. Q. Do you live in that apartment alone?
A. I share the apartment with someone.
5. Q. Who pays the rent at the apartment?
A. I pay it in the form of cash.
6. Q. Where do you get the money to live on?
A. I borrow money from different friends of mine and I get help from my father, brothers and sisters, who are fairly wealthy.

7. Q. Do you have any source of income?
A. I have no income whatsoever.

8. Q. Have you a bank account?
A. I had one for the last year and a half at the Emmet County State Bank, Harbor Springs, Michigan, which was closed out about two weeks ago.

9. Q. How big a balance did you carry at that bank?
A. $13.00.

10. Q. Are there any other judgments against you?
A. About 125 that I know of.

11. Q. How much do you owe?
A. About $340,000.

. . . . . .

14. Q. Does your father live in New York City?
A. No, Petoskey, Michigan. He comes to New York and lives with me quite often.

15. Q. Does the rest of your family live there too?
A. In Petoskey, Michigan.

[fol. 1615] 16. Q. Are you still in the fur business?
A. It's been so bad of late, that I've practically given up all fur contacts.

17. Q. Have you any immediate prospects of income?
A. I have nothing to look forward to at the present time, and I contemplate going back to Petoskey, Michigan, if I don't get some source of income shortly.

. . . . . .

19. Q. Have you any jewelry?
A. None.

20. Q. I suppose you've been asked all the customary questions about stocks, bonds, etc.?
A. I have nothing; no money of any kind; no money coming to me from anybody.

———.

Sworn to before me this — day of October, 1936.

———.

[fol. 1616] GOVERNMENT'S EXHIBIT 101

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of Supplementary Proceedings

HEARST HOTELS CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor.

EXAMINATION IN SUPPLEMENTARY PROCEEDINGS OF JUDGMENT-DEBTOR, SAM FELDMAN, THIS 6TH DAY OF SEPTEMBER, 1939

STATE OF NEW YORK,
County of New York, ss:

SAM FELDMAN, judgment-debtor, having first been duly sworn, for this, his examination in supplementary proceedings, testifies as follows:

By Mr. Meyerson:

Q. Is your full name Samuel Feldman?
A. Harry is my middle name.

* * * * * * *

Q. When have you last been employed?
A. I have never been employed for the last fifteen years.
Q. When were you last engaged in business of any kind?
A. I am still engaged in the fur business * * * but [fol. 1617] there has been none for the last year that I have been able to do.
Q. Where do you maintain this fur business you are engaged in?
A. I have no place. I go around from one house to another whenever I have orders to fill.
Q. When you say "orders" you mean from retail customers?
A. From individual customers.
Q. Will you explain what this business consists of?
A. When the fur business was good, different individuals who might know me, or who have been recommended to me, would get in touch with me and inquire about a certain fur article they may be interested it. I, in return, then try to bring them down to a certain manufacturer who might

make that particular article. I would have 10% to 15% on the sale of the fur, giving them the benefit of a wholesale price.

Q. With what houses in particular do you deal with?

A. My activities within the last three or four years were with a firm by the name of A. Walzer & Sons, 330 7th Avenue.

Q. Is that all you do in the fur business—getting customers and try to make a sale?

A. That is all I do in the manufacturing line. I then many times sell my father's raw furs, which he ships to New York.

Q. Where is your father's business?

A. Petoskey, Michigan.

Q. Are you informed of all shipments of raw furs to New York City by your father?

A. No, only when he does not make a sale direct does he ask me to help consummate a deal.

Q. Do you act as New York representative for your father?

A. No, only as a son willing to help his father.

[fol. 1618] Q. When have you last handled a transaction for your father?

A. I helped handle a transaction two months ago when he was here.

Q. How much was involved in that transaction?

A. Around $300.

Q. Does you father's firm maintain any other agency or branch in New York City?

A. He has no agency or branch here. This is the direct market, and that is why he ships here.

Q. He has no direct representative in New York City?

A. None.

Q. You are never paid by him?

A. Never received any moneys. Of course, when I wish to borrow money, he doesn't refuse me. He has been paying my rent direct to the Navarro Hotel for the last two and one-half years.

Q. Prior to this transaction of a few months ago, when did you have another transaction for your father?

A. Around the holidays.

Q. You mean Christmas time?

A. Yes.

Q. One transaction, or many?
A. One transaction.
Q. How much was involved on that occasion?
A. Around $600.

• • • • • • •

Q. Have you any interest of any kind in A. Walzer & Sons?
A. None whatever.
Q. Have you any interest in your father's concern?
A. No. The name of the firm is just "J. Feldman".
Q. Has your brother an interest in that firm?
A. He did have until the firm of J. Feldman & Sons was dissolved.
Q. Prior to the dissolution of J. Feldman & Sons, did you also have an interest in it?
A. Never had an interest in it.

• • • • • • •

[fol. 1619] Q. Did you file an income tax return for 1938?
A. Yes.
Q. What earnings did you list?
A. None.

• • • • • • •

Q. As I understand it, your father pays your rent at the hotel?
A. For two and one-half years or more.
Q. Also, I assume he has been paying your other incidental expenses?
A. I have been borrowing from the rest of my family for incidental things.

• • • • • • •

Q. Does anybody owe you any money?
A. No.

• • • • • • •

Sam Feldman.

Sworn to before me this 6th day of October, 1939.

[fol. 1620] GOVERNMENT'S EXHIBIT 102-A

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on April 13, 1937 and June 11, 1937, and sworn to July 21, 1937)

[Page 12]

Q. Are your paid up to date in your obligation to the Essex House?
A. No, sir.
Q. Are you indebted to them?
A. Yes, sir.
Q. For how much?
A. Twenty-six hundred ($2,600.) Dollars.
Q. Are there any other judgments against you?
A. About one hundred and fifty.

Examination adjourned to May 12th, 1937.

[Page 46]

Examination by Mr. Bushel:

Q. Did you say something about going into bankruptcy?
A. Yes, I am going into bankruptcy.
Q. When did you decide to go into bankruptcy?
A. I have had it in my mind a long time. I decided last night, but today I am convinced that I intend to.
Q. I suppose you intend to disclose all your assets?
A. I have no assets.

[fol. 1621] GOVERNMENT'S EXHIBIT 102-B

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on June 11, 1937 and sworn to July 21, 1937)

[Page 40]

Q. How often does your father send you checks?
A. Sends me a book about once a month.
Q. And this book is signed by your father?
A. Yes.
Q. How do you get it?
A. By mail.

[Page 41]

Q. Now, did you send any money to your father today?
A. I did.
Q. By Western Union?
A. Yes.
Q. What office?
A. 58th Street and Six Avenue.
Q. How much did you send?
A. $3,500.
Q. And you got a receipt from the Western Union?
A. Yes.
Q. What time of the day was it that you sent this money?
A. 1:00 o'clock.
Q. Did you send any other money to your father today?
A. No.
Q. How about yesterday, June 10th?
A. No. June 7th $3,000.
Q. What office?

[Page 42]

A. Same office.
Q. What did you do with the receipt
A. Tore it up.
Q. How soon after you got it?
A. Right after I got it.
Q. What is your purpose in tearing up these receipts?
A. Not to have people know what I am doing.
Q. You did not get a verification from your father?
A. I got no verification from my father.

[fol. 1622] GOVERNMENT'S EXHIBIT 102-C

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on June 11, 1937 and sworn to July 21, 1937)

[Page 26]

Q. Have you sent any money by Western Union during the last year?
A. Yes.
Q. Will you state when and the amounts and where you sent it?
A. I have no record of it.
Q. To whom did you send money by Western Union for

[Page 27]

the last year?

A. A. J. Feldman, Petosky, Michigan.

Q. You sent money to him by Western Union, and from where did you send it?

A. From different Western Union offices.

Q. And how often do you send money to Michigan?

A. Real often.

Q. Every week?

A. Yes.

Q. Do you know how much you sent during the last year?

A. No.

Q. How much did you send during the month of June, up to June 11, 1937?

A. $15,000 to $20,000.

Q. Who is J. Feldman?

[Page 28]

A. My father.

Q. From June 1, 1937 to June 11, 1937 you sent your father by Western Union $15,000. or $20,000?

A. Correct.

Q. Where did you send this money from. What office?

A. Different offices.

[fol. 1623] Q. Give me the offices you recollect?

A. Most of it from 58th Street and Sixth Avenue.

Q. Where else?

A. Down around 32nd Street and 7th Avenue.

[Page 29]

Q. Where else?

A. That is all.

Q. Where did you get this $15,000. or $20,000?

A. By cashing my father's checks.

Q. Please explain that? What do you mean by cashing your father's checks?

A. I happened to be terribly in debt in the vernacular. I am taking advantage of my father's credit by "kiting" his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his.

Q. What do you mean by that? I don't understand that.

A. In other words, I am "kiting." I am about $6,000. in debt, and I cashed his checks from time to time, and wire the money to him to make the checks good that I have

already cashed until such time as I can borrow the money to make good the last one.

Q. How does your father send you these checks?

A. By mail.

Q. For what purpose?

A. Knowing that I am in difficulty, and trying to be a dutiful father, and help me out.

Q. These checks are on what bank?

A. First National Bank, Petoskey, Michigan.

[Page 30]

Q. Have you a power of attorney from your father?

A. It is not at all necessary because the checks are signed by him.

[fol. 1624] Q. Have you a power of attorney executed by your father?

A. No.

Q. How much did you receive from your father from June 1 to June 11, 1937?

A. He sends me blank checks signed. I use them as I see fit.

Q. To pay your obligations?

A. I am still involved.

Q. In other words, your father sends you blank checks signed by him?

A. Yes.

Q. The name of the payee blank?

A. Yes.

Q. How is the check signed?

A. J. Feldman.

Q. And then you make out the check for any amount you want?

A. Yes, sir.

Q. You fill in the date?

[Page 31]

A. Yes, sir.

Q. From June 1 to June 11, 1937 you paid certain obligations with the moneys that you received?

A. I have been overdrawn.

Q. Did you pay any of your indebtedness with the checks that you received from your father during the month of June, 1937?

A. I paid the hotel.

Q. How much?
A. I paid them $1,100. on account.
Q. On account of what?
A. Of indebtedness.
Q. Representing what?
A. Cash advanced, about $900., the balance for sundries.
Q. During what period of time did the Essex house advance you $900.?
A. Over a period of six weeks.
Q. How much did they advance you from June 1 to June 11?
A. $500.
Q. What date in June?
A. Today.
Q. What did you do with the money?
A. Wired it to my father.
[fol. 1625] Q. When in May did the Essex House advance

[Page 32]

you the money?
A. Different times.
Q. What did you do with the money?
A. Wired it to Petoskey.
Q. What business is your father in?
A. Hides, furs, wool.
Q. Let me ask you this question. How much do you owe the Essex House at the present date?
A. About $2,800.
Q. Do you get cash from the Essex House any time you want?

[Page 33]

A. Only on a new account.
Q. What do you mean on a new account?
A. There is an old account set aside there for about $2,200. That is now shown on the new account.
Q. Under what name was the old account?
A. Same name—Sam Feldman.
Q. What is the name of the new account?
A. Sam Feldman.
Q. What do you mean old account and new account?
A. Because it is under new management.
Q. How much do you owe them in the new account?
A. About $850.

Q. And the old account you owe how much?
A. About $2,000.

[Page 35]

Q. Mr. Feldman, you told me a minute ago, when I saw you in the library of this office conferring with your at- [fol. 1626] torney, that you were going to file a petition in bankruptcy. Is that correct?
A. Yes.
Q. Did you tell me at that time which was about five minutes ago that you were going to file a petition in bankruptcy?
A. I said I am compelled to.
Q. You said to me that you are going to file a petition in bankruptcy?
A. Yes.
Q. When are you going to do that?
A. Immediately.
Q. Where?
A. I don't know.
Q. Didn't you a little while ago say to me in Michigan?
A. That is my contemplation.

[Page 36]

Q. Did you make that statement to me?
A. Yes.
Q. You say Mr. Feldman that you are heavily in debt?
A. Tremendously.
Q. Still you pay $250. a month?
A. Yes.
Q. For how long have you been living at the Essex House paying $250. a month?
A. Eight months.
Q. Has that been a continuous tenancy at the Essex House for the past eight months?
A. Yes.
Q. You have been paying $250. a month. Have you occupied the same apartment?
A. Yes. 3501.
Q. Prior to the last eight months you resided at the Essex House?
A. Yes, in a single room.
Q What was the apartment?
A. I don't recall. The third floor.

Q. How long did you occupy that?
A. Two years, at $75, per month.

[fol. 1627] GOVERNMENT'S EXHIBIT 102-D

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on July 9, 1937 and sworn to July 21, 1937)

[Page 69]

Q. You have been doing an awful lot of calling to your father. He is from Petoskey? You have called him every day?
A. Was compelled to.
Q. He did not reverse any charges did he?
A. No, but he paid for all the 'phone calls of last month.
Q. How did he pay for them?
A. By check.
Q. Whose check?

[Page 70]

A. J. Feldman signed the check.
Q. Who filled out the check?
A. I did.
Q. It is the same kind of checks that you have been "kiting"?
A. I object to that.
Q. Didn't you use the word "kiting"? Didn't you yourself use that word?
A. That is the real term for it, but I don't recall using the word. If that is what you want all right. You shouldn't be so nasty. You are making me look like a burglar.

[fols. 1628-1639] GOVERNMENT'S EXHIBIT 102-E

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on July 9, 1937 and sworn to July 21, 1937)

[Page 71]

Q. Didn't you send all this money that you were wiring

[Page 72]

to make good checks?

A. "Kiting" as you mention it, and have been doing it for seven months.

[Page 73]

Is there anything you can recollect to help your creditors find out where your money is?

A. I have no money.

[fol. 1640] In United States District Court, Southern District of New York

Index No. C 108-159

United States of America, Appellee,

against

Samuel H. Feldman, Defendant-Appellant

Notice of Appeal and Grounds

Name and Address of Appellant: Samuel H. Feldman, Hotel Navarro, 112 Central Park South, Borough of Manhattan, City of New York.

Name and Address of Appellant's Attorney: Seymour M. Klein, Esq., 150 Broadway, Borough of Manhattan, City of New York.

Offense: Violation of Section 338 of Title 18 of the U. S. C. A. (Mail Fraud).

Date of Judgment: July 9th, 1942.

Brief Description of Judgment or Sentence: Five years' imprisonment on Counts 1, 3, 5, 6 and 8. The sentence is to run concurrently. Directed verdict in favor of the defendant on Counts 2 and 4. Five years' probation at the end of the prison term on Counts 7 and 9.

[fols. 1641-1643] Name of Prison Where Appellant is Now Confined: Appellant is at present confined at the Federal House of Detention, 11th Street, Borough of Manhattan, City of New York.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from the judgment above mentioned on the grounds set forth below.

Dated, New York, July 10th, 1942.

Samuel H. Feldman, Defendant-Appellant.

GROUNDS OF APPEAL

. . . . . .

[fol. 1644] 18. The Court erred in admitting evidence of defendant-appellant's testimony in supplementary proceedings before various courts of the State of New York, which testimony was compulsory and the admission of which was in violation of defendant-appellant's constitutional rights, to which exception was duly taken.

. . . . . .

[fol. 1645] 24. The Court erred in instructing the jury as to the legal effect and rights and obligations arising thereunder of certain New York State Statutes which will be more fully hereinafter described in the Assignment of Errors, and as to which the defendant-appellant duly excepted.

. . . . . .

[fol. 1646] 30. That the constitutional rights of the defendant-appellant were violated during the course of the trial, and to which the defendant-appellant duly excepted.

The foregoing grounds of appeal are not intended and are not to be construed in any way to limit or define the scope of the Assignment of Errors to be hereinafter filed.

Marshall, Bratter & Seligson, Attorneys for Defendant-Appellant, Office & P. O. Address, 150 Broadway, Borough of Manhattan, City of New York.

[fols. 1647-1654] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff-Respondent,

against

SAMUEL H. FELDMAN, Defendant-Appellant

ASSIGNMENT OF ERRORS

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which he will rely in his prosecution of the appeal from the judgment made by this Honorable Court on the 9th day of July, 1942.

. . . . . .

[fols. 1655-1658c] XIX. The United States District Court erred in admitting into evidence defendant's testimony in supplementary proceedings and parts of such testimony taken before various courts of the State of New York, which was erroneously and improperly admitted and was in violation of the defendant's constitutional rights, to all of which exception was duly taken (pages 1234 to 1273; 1026 to 1029; 1463-1466; Exhibits 95 at page 1588, 95A at page 1597, 95B at page 1604, 100 at page 1613, 101 at page 1616, 102A through E at pages 1620 to 1628).

. . . . . .

[fols. 1658d-1664] XXXI. The constitutional rights of the defendant were violated during the course of the trial, to which the defendant duly excepted.

Wherefore, the appellant prays that the said judgment and sentence be reversed and the indictment be dismissed, or that a new trial be granted and that the Court grant such other and further relief as it see fit.

Marshall, Bratter & Seligson, Attorneys for Appellant,

Seymour M. Klein, Of Counsel.

[fol. 1665] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT—October Term, 1942

No. 180

(Argued February 9, 1943 Decided June 8, 1943)

UNITED STATES OF AMERICA, Appellee,

v.

SAMUEL H. FELDMAN, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

The appellant was convicted of using the mails for the purpose of executing a scheme to defraud, 18 U. S. C. §338. Judgment affirmed.

Before Swan, Augustus N. Hand, and Clark, Circuit Judges

Marshall, Bratter & Seligson, Attorneys for Appellant; Seymour M. Klein, of Counsel; Ruth F. Rosenthal and Harry L. Wechsler, on the Brief.

Mathias F. Correa, United States Attorney, for Appellee; Frederick H. Block, Peter J. Donoghue and Thomas K. Fisher, Assistant U. S. Attorneys, of Counsel.

[fol. 1666] SWAN, Circuit Judge:

The appellant was prosecuted upon an indictment of nine counts, each of which charged a scheme to defraud and a use of the mails in furtherance thereof, in violation of section 215 of the Criminal Code, 18 U. S. C. § 338. Seven of the counts were left to the jury. The appellant was found guilty on all of them and was sentenced to imprisonment for a term of five years.

The fraudulent scheme charged in the indictment was the "kiting" of checks. Such a scheme when the maker knows that he has no prospect of paying the checks and uses the mails in furtherance of his scheme is a violation of the mail fraud statute. *Federman* v. *United States*, 36 F. 2d 441 (C. C. A. 7), cert. den. 281 U. S. 729; *Lowe* v. *United States*, 115 F. 2d 596, (C. C. A. 7), cert. den. 311 U. S. 717; see also *Charles* v. *United States*, 213 F. 707 (C. C. A. 4).

The proof showed that in August 1936 Feldman caused a small checking account to be opened in the name of "J. Feldman," his father, in a bank in Petoskey, Michigan. Then, operating in New York with blank checks signed by the father, he would fill in the amounts and the names of payees and would present the checks to various persons to be cashed, knowing that the funds on deposit were insufficient to meet the checks and that neither he nor his father had the financial means to pay them. During the first eight months of 1937 a mounting series of such checks were cashed, frequently by the Essex House, where Feldman rented an apartment. Knowing that it would take four or five days for the checks to be cleared through the Petoskey bank, he would present and cash additional checks and telegraph money to pay the checks previously issued. On August 20, 1937, when the managing director of the corporate owner of the Essex House learned of the check kiting,

[fol. 1667] the J. Feldman account in the Petoskey bank had on deposit 24 cents, while the outstanding checks which Essex House had cashed between August 16 and 20, inclusive totaled $30,700. During the period from January to August inclusive, the appellant had telegraphed to the Petoskey bank more than $860,000 to cover checks previously cashed. When confronted by the attorney for Essex House with a demand that he take care of the outstanding $30,700 of checks, he said that neither he nor his father could pay them. Nevertheless on August 21st he telephoned a young man named Reynolds, who mailed him a number of checks signed in blank drawn on Reynold's account in a bank at Dayton, Ohio. Reynolds told the appellant that he had no money in the account and that the checks were not to be cashed unless the appellant sent the money to cover them. Disregarding this, the appellant filled in and cashed checks on Reynolds' account and thereby obtained the money to take up the outstanding Essex House checks. The fact that the latter were paid is no defense, since it is immaterial whether the unlawful scheme succeeds in actually defrauding an intended victim. *Foster* v. *United States*, 178 F. 165 (C. C. A. 6); *United States* v. *Rowe*, 56 F. 2d 747, 749 (C. C. A. 2), cert. den. 286 U. S. 554; *Baker* v. *United States*, 115 F. 2d 533 (C. C. A. 8), cert. den. 312 U. S. 692, rehearing den. 312 U. S. 715.

The Reynolds checks were protested. Thereupon Reynolds, accompanied by his financee, his mother and his mother's attorney, came to New York and interviewed Feldman, who told them he was "broke" and could not pay. Later he gave Mrs. Reynolds notes to cover the money she advanced to make her son's checks good, but these were never paid.

The mailings charged in the several counts of the indictment occurred in August 1937. Two relate to checks cashed by Essex House, the other five to the Reynolds transaction.

[fol. 1668] Nevertheless a very large part of the voluminous record consists of evidence concerning the appellant's resumption of kiting checks drawn on the J. Feldman account and cashed by Stout & Company between September 1938 and April 1939. There was also testimony as to transactions with Emanuel & Co. in 1930. Most of the errors in the conduct of the trial of which the appellant complains relate to these "similar transactions" which were relevant only on the issue of the appellant's fraudulent intent in the check kiting to which the mailings related. Why the government thought it necessary or desirable so greatly to lengthen the trial by the introduction of a mass of evidence relating to similar transactions we find difficult to understand in view of the completeness of its proof as to the Essex House and Reynolds transactions. Indeed the appellant's fraudulent intent was proved out of his own mouth by the introduction of testimony given by him in supplementary proceedings conducted by judgment creditors in courts of the State of New York. In these examinations he stated under oath that there were about 150 judgments against him representing an indebtedness of nearly $350,000; that he had no business and no source of income, was living on money borrowed from family and friends, and was contemplating bankruptcy. He even explained the precise scheme with which the indictment charged him, saying "I am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. • • • I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one," folio 4868. "He sends me blank checks signed. I use them as I see fit," folio 4870. "'Kiting' as you mention it, and have been doing it for seven months. • • • I have no money," folio 4883. He also admitted tearing up Western Union receipts for money wired to his

[fol. 1669] father, his purpose being "Not to have people know what I am doing," folio 4863. These excerpts are from examinations sworn to in July 1937; that is, during the very period covered by the indictment. Several of them were stressed in the government's summation. With this evidence before the jury a verdict of guilt was inevitable.

The appellant did not take the stand to testify in his own behalf. He objected to the admission of his examinations in supplementary proceedings as a violation of his constitutional privilege under the Fifth Amendment not to be compelled to be a witness against himself. If the objection was well taken the judgment must be reversed; if it was not well taken the appellant's guilt is so clearly established that other alleged errors in the conduct of the trial may well be disregarded as non-prejudicial.

Under the law of New York a judgment debtor can be compelled to give testimony concerning his affairs and cannot refuse to answer on the ground of self-incrimination since his testimony cannot be used against him in a state prosecution. N. Y. Civ. Prac. Act § 789 (formerly § 791); *People* v. *Carlson*, 222 App. Div. 54. Although Feldman did not claim immunity under the Fifth Amendment on the ground that his answers might subject him to a federal prosecution, his counsel argues that such a claim could not have prevailed had it been made. *Jack* v. *Kansas*, 199 U. S. 372.* Consequently it is urged that the first opportunity Feldman had to claim his constitutional privilege was when his examinations in supplementary proceedings were offered in evidence, and he then did so. The argument assumes that the constitutional privilege operates to render

---

* Similarly a witness compelled to testify under a federal statute cannot assert a privilege against self-incrimination under state law. *Brown* v. *Walker*, 161 U. S. 591; *United States* v. *Murdock*, 284 U. S. 141.

[fol. 1670] inadmissible in a federal prosecution testimony given under a threat of judicial compulsion in litigation in a state court. No controlling authority has been cited for this proposition. *Clark* v. *State*, 68 Fla. 433, the only case relied upon by the appellant, presents the converse of the situation at bar. There testimony which the defendant had given in a bankruptcy proceeding was put in evidence against him in a state prosecution for embezzlement. Without discussion of the problem the opinion held this to be a violation of a provision in the state constitution which is the counterpart of the federal privilege under the Fifth Amendment. We are not convinced that this decision should control determination of the case at bar. In *Johnson* v. *United States*, 228 U. S. 457, the defendant was convicted upon an indictment for concealing money from his trustee in bankruptcy. His books, title to which passed by operation of law to his trustee, were used against him. In affirming the conviction Mr. Justice Holmes remarked "A party is privileged from producing evidence but not from its production." In *United States* v. *Murdock*, 284 U. S. 141, the defendant was indicted for refusing to answer questions propounded by an internal revenue agent concerning deductions claimed in the defendant's income tax returns. His refusal was based on the claim that his answers might incriminate him under state law. In discussing his claim of privilege the court said at page 149:

> "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. King of the Two Sicilies v. Willcox, 7 St. Tr. (N. S.) 1050, 1068; Queen v. Boyes, 1 B. & S. 311, 330. This court has held that immunity against state prosecution is not essential to the validity of

[fol. 1671] federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman v. Hitchcock, 142 U. S. 547, Brown v. Walker, 161 U. S. 591, 606. Jack v. Kansas, 199 U. S. 372, 381. Hale v. Henkel, 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained."

Similarly, in *Hale* v. *Henkel*, 201 U. S. 43, at 69, the English rule was stated approvingly thus: "* * * the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." We are, therefore, of opinion that the testimony Feldman gave in the supplementary proceedings was competent evidence against him.

It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority. The government contends that the question was passed upon by our decision in *Vause* v. *United States*, 53 F. 2d 346, 356, cert. den. 284 U. S. 661. There the defendant Schuchman was cross examined relative to testimony he had given in supplementary proceedings under § 791 of the New York Civil Practice Act. But that decision goes no further than to hold that such testimony may be used on cross examination when the defendant under prosecution waives his privilege by taking the stand. *Cf. Raffel* v. *United States*, 271 U. S. 494, 497; *United States* v. *Buck-*

[fol. 1672] *ner*, 108 F. ed. 921, 929 (C. C. A. 2), cert. den. 309 U. S. 669; *United States* v. *Mortimer*, 118 F. 2d 266, 268 (C. C. A. 2), cert. den. 314 U. S. 616. Possibly the absence of readily discoverable authority may be explained by the existence from 1868 until its repeal in 1910 of § 860 of the Revised Statutes This provided:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The fact that such a statute was thought necessary tends to support our conclusion that in the absence of a federal statute testimony obtained in litigation in a state court is competent evidence in a federal prosecution. See *United States* v. *Hughes*, 12 Blatch. 553, 559; *Czarlinsky* v. *United States*, 54 F. 2d 889, 893 (C. C. A. 10), cert. den. 285 U. S. 549; *Johnson* v. *United States*, 163 F. 30, 32 (C. C. A. 1).

Moreover, even if the federal privilege against self-incrimination extended to compulsory testimony in state courts, the record here fails to show wherein the appellant suffered prejudice. The admissions sworn to in July, 1937 (excerpts from which appear above) were, of all his statements, both the most damaging in content and the closest in point of time to the mailings charged in the indictment. Yet these were plainly admissible, because the defendant could not have had a privilege in July against testifying as to a crime he did not commit until August, and because

[fol. 1673] the federal authorities, by delaying the indictment till the statute of limitations had run on offenses committed prior to August 1937,* gave him the immunity against prosecution which has been held equivalent to the constitutional privilege. *Brown* v. *Walker*, 161 U. S. 591. See *Hale* v. *Henkel*, 201 U. S. 43, 67. Once there had been admitted these declarations that he had no funds and that he had kited checks, his much later statements of October 1938 to September 1939 became mere cumulative reiteration of matters already abundantly proved, and cannot have had any substantial effect on the jury's verdict.

Error is alleged in the admission of evidence concerning transactions with Emanuel & Co. in 1930. It is urged that these transactions were too remote in time and too dissimilar in character. Emanuel & Co. was a stock brokerage concern with which the appellant had an account and to which he gave a $50,000 draft drawn on one Heller who had neither any obligation nor any funds to meet it, as Feldman knew. We regard the transaction as sufficiently similar in character to be admissible on the issue of intent. See *United States* v. *Seeman*, 115 F. 2d 371, 373 (C. C. A. 2). But it was so remote in time that it might well have been excluded. However this is a matter in which the trial judge should be allowed a wide range of discretion. *United States* v. *Shurtleff*, 43 F. 2d 944, 948 (C. C. A. 2); *Mayer* v. *People*, 80 N. Y. 364, 373. With respect to a "similar transaction," the more remote it is in time, the less compelling is its probative value on the issue to be tried. Even if we were prepared to find error in the admission of evidence of transactions which occurred six years before the mail fraud charged in the indictment, we are not convinced that it was

* The indictment was filed Aug. 20, 1940. The applicable limitation is three years. 18 U. S. C. § 582.

[fol. 1674] so prejudicial as to require a reversal of the judgment in a case where guilt was so clearly proved.

Complaint is also made with respect to restrictions upon the cross-examination of Goetz and Miller, partners of Stout & Company, who were called as witnesses by the prosecution. During some six months in 1938 and 1939 the appellant kited checks which were cashed either at the New York office or at the Florida office of Stout & Company. Goetz and Miller gave testimony tending to prove that they were victims of the appellant's misrepresentations as to his checks being good or his ability to make them good. The defense attempted to show that the partners gave accommodation to Feldman for business reasons, knowing that the funds in his bank account were insufficient to meet his checks. Stout & Company carried insurance which would have protected them against losses resulting from fraud of the sort charged against Feldman. On cross-examination his counsel attempted to inquire into prior statements, declarations and conduct of Goetz and Miller with reference to making a claim upon the insurance policies that were inconsistent with their testimony. The trial court's rulings prevented such inquiry. This was erroneous. Prior statements that the partners did not consider themselves to have been defrauded would have been inconsistent with the testimony that "in the beginning" they cashed Feldman's checks believing them to be good (fol. 2385). Such statements were admissible to discredit their testimony. *Wigmore, Evidence*, 3rd ed. § 1041; see *Judson* v. *Fielding*, 227 App. Div. 430, aff'd 253 N. Y. 596; *Pierce* v. *Sanden*, 29 F. 2d 87, 90 (C. C. A. 8). Similarly, evidence as to their conduct with respect to the insurance investigation and claim was competent, for "a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the

[fol. 1675] fact." *Wigmore, Evidence*, 3rd ed. § 1042; see *Barrett* v. *N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 663, 670; *Lilly* v. *Hamilton Bank*, 178 F. 53, 59 (C. C. A. 3). But again we are satisfied that these errors could not have affected the jury's verdict.

We find no error in the charge. Other objections to the conduct of the trial are deemed too trifling to merit discussion. Indeed the defendant's guilt was so overwhelmingly established that only a most glaring error could be prejudicial.

Judgment affirmed.

CLARK, Circuit Judge (dissenting):

The present is one of those disturbing cases where the conduct of the defendant is most unattractive, to put it mildly; and yet there was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished. I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial, particularly in view of the natural prejudice which defendant's conduct tended to inspire. But that care was not exercised.

The defense centered on the point that the various persons who cashed the checks for defendant knew what he was up to and assisted him knowingly. Although I agree that even on this issue there was sufficient evidence to take the case to the jury, my view as to the substantial character of the trial court's errors is necessarily influenced by my own conclusion that the affirmative evidence of knowledge was strong. Certainly agents of the Essex House had it, and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the

[fol. 1676] sizable amounts of these daily transactions. Again there can be no question but that Goetz and Miller had knowledge at some time while the practice continued; the only question is whether for a period one of them at least lacked it. Hence cross-examination of these witnesses as to their prior statements, declarations, and conduct was highly important and significant. Refusal to permit such examination was, therefore, clearly erroneous, as the opinion points out. In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal.

As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in, and Reynolds naively complied. What would he have sent the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important.

Under all the circumstances, I would find error not only in the limitation of cross-examination of Goetz and Miller already referred to, but also in the action taken with respect to the other two matters particularly considered in the opinion as well as in the conduct of the trial generally. The question of use in the federal courts of defendant's examination in the state supplementary proceedings, absolutely privileged on a state prosecution, is, as the opinion shows, not settled. I believe, however, that *Clark* v. *State, supra,* states the better rule, unless we definitely wish to trap persons between the interstices of the overlapping state and federal sovereignties. Cases such as *United States* v. *Murdock, supra,* show merely that defendant could not have refused to answer in the state proceedings; they do not hold

[fol. 1677] that the immunity promised him can be substantially nullified by the wide scope of the federal mail fraud and conspiracy statutes. In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those "civilized standards of procedure and evidence" required by *McNabb* v. *United States*, 63 S. Ct. 608, 613.

As to the proof of the similar Emanuel transactions many years earlier, of course the admissibility of such evidence should generally be within the discretion of the trial court; but if I am correct that the case was so close on the showing of both an intent to defraud and a defrauding, then this long outdated evidence might well have been enough to turn the scales against defendant.

There were other details of the trial which I find disturbing, in view of this condition of the evidence. These included such matters as the different treatment of defense and prosecution counsel, the former being required to state his proposed testimony at length in chambers, to be there ruled out for the most part, while the latter was allowed to present his claims as usual in the courtroom before the jury; or the allowing of an inference against defendant for not calling Mrs. Reynolds' Florida lawyer to rebut a self-serving reference by her on the witness stand; or as to errors in the charge clearly made, though possibly corrected before the jury retired. Without rehearsing these in detail, I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail.

[fol. 1678] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of June, one thousand nine hundred and forty-three.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

SAMUEL H. FELDMAN, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk, by A. M. Bell, Deputy Clerk.

[fol. 1679] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America v. Samuel H. Feldman. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 24, 1943. D. E. Roberts, Clerk.

[fol. 1680] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1681] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether petitioner's testimony given in the New York supplementary proceedings was properly admitted in evidence at the trial.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

Endorsed on cover: File No. 47,586. U. S. Circuit Court of Appeals, Second Circuit. Term No. 193. Samuel Feldman, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1943. Term No. 193, O. T., 1943.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 23 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

JAMES MARSHALL,
Attorney for Petitioner.

Of Counsel:
SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

Dated, New York, July 22, 1943.

APPEAL PRINTING CO., INC., 120 CEDAR ST., NEW YORK, WO 2-3343

INDEX

	PAGE
PETITION	1
History of Case	1
Summary Statement of the Matter Involved	2
Questions Involved	3
Reasons for Granting the Writ	8
BRIEF	13
Jurisdiction	13
Statement of the Case	13
Specification of Errors	13
Argument:	
I—Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation	15
II—The Circuit Court erred in sustaining the District Court's deprivation of petitioner's basic right of cross-examination of the witnesses Miller and Goetz, the two partners of Stout & Co., on vital parts of the Government's case	23
III—The Circuit Court erred in holding that the transactions in 1930 with Emanuel & Co. were admissible in evidence	24

PAGE

IV—The submission to the jury of the Government's bill of particulars with the names of 115 alleged victims constituted reversible error 29

V—The erroneous charge of the trial court to the jury respecting the crime with which petitioner was charged and its refusal to grant petitioner's request for a specific charge correcting its error constituted reversible error 31

VI—The errors of the trial court deprived petitioner of a fair trial and the Circuit Court of Appeals erred in failing to reverse petitioner's conviction 33

CONCLUSION 38

APPENDIX:

Section 338, Title 18, U. S. Code 39

N. Y. Civil Practice Act, Sec. 789 40

Table of Cases Cited

	PAGE
Barrett *v.* N. Y. C. & H. R. R. R. Co., 157 N. Y. 663, 670	23
Beck *v.* U. S., 145 Fed. 625, 626 (C.C.A. 2d, 1906), at page 626	32
Booth *v.* U. S., 139 Fed. 252 (C.C.A. 2nd Cir. 1905)	31
Boyd *v.* U. S., 116 U. S. 616, 635 (1885)	16
Boyd *v.* U. S., 142 U. S. 450 (1891)	25, 27
Brown *v.* Walker, 161 U. S. 591 (1895)	9, 17, 18
Chicago, Milwaukee & St. Paul Railway *v.* Artery, 137 U. S. 507, at page 519 (1890)	24
Clark *v.* State, 68 Fla. 433, 67 So. 135 (1914)	10, 18, 19, 20
Erber *v.* U. S., 234 Fed. 221 (C.C.A. 2nd, 1916)	27
Fish *v.* U. S., 215 Fed. 544 (C.C.A. 1st, 1914), at page 549	27
Graves *v.* U. S., 150 U. S. 118 (1893)	34, 35
Hale *v.* Henkel, 201 U. S. 43, at page 69	19
Hamburg-American Steam Packet Co. *v.* U. S., 250 Fed. 747 (C.C.A. 2nd, 1928)	34
Harris *v.* U. S., 273 Fed. 785, 791 (C.C.A. 2nd, 1921), cert. den., 257 U. S. 646 (1921)	26
Hass *v.* U. S., 93 Fed. 2nd 427 (C.C.A. 8th), at pages 434, 435	32
Jack *v.* Kansas, 199 U. S. 372 (1905)	9, 16, 18
Jianole *v.* U. S., 299 Fed. 496 (C.C.A. 8th, 1924)	26
Judson *v.* Fielding, 227 App. Div. 439, aff'd. 253 N. Y. 596	23
Kercheval *v.* U. S., 12 Fed. (2nd) 904 (C.C.A. 8th, 1926), rev. 274 U. S. 220 (1926) on other grounds	26
Lilly *v.* Hamilton Bank, 178 Fed. 53, 59 (C.C.A. 3rd Cir.)	23
Longacre *v.* Yonkers Railway, 236 N. Y. 126 (1923)	34

PAGE

MacDonald *v.* U. S., 264 Fed. 753 (C.C.A. 1st, 1920) 27
McNabb *v.* United States, 63 S. Ct. 608, 613 ..... 10, 22
Milby *v.* United States, 109 Fed. 638 (C.C.A. 6th, 1901) 36

Niederluecke *v.* U. S., 21 Fed. (2nd) 511 (C.C.A. 8th, 1927) 27
Norton *v.* United States, 92 Fed. (2nd) 753 (C.C.A. 9th, 1937) 36

Packer *v.* U. S., 106 Fed. 906 (C.C.A. 2nd, 1901) 26
Paris *v.* U. S., 260 Fed. 529 (C.C.A. 8th, 1919) 27
People *v.* Carlson, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927) 16
People *v.* Doyle, 58 Hun 535 (N. Y. 1890) 16
People *v.* Levine, 265 App. Div. 513 (1943) 30
People *v.* Root, 94 App. Div. 84, 91 31
Pierce *v.* Sanden, 29 Fed. 2d, 87, 90 (C.C.A. 8th Cir.) 23

Quig *v.* U. S., 33 Fed. (2d) 820 (C.C.A. 3rd, 1929) 28

Rostello *v.* U. S., 36 Fed. 2nd 899 (C.C.A. 7th, 1927) 34

Safarik *v.* U. S., 62 F. (2d) 892, 897 (C.C.A. 8th, 1933) 16
Shea *v.* U. S., 236 Fed. 97 (C.C.A. 6th, 1916) 28
Simpkins *v.* U. S., 78 Fed. (2nd) 594 (C.C.A. 4th, 1935) 25, 26

U. S. *v.* Murdock, 284 U. S. 141 ..... 9, 10, 19
U. S. *v.* Seeman, 115 Fed. 2nd 371 (C.C.A. 2nd, 1940) 28

Wolf *v.* U. S., 290 Fed. 738 (C.C.A. 2nd, 1923) 25, 26
Wolfe *v.* Madison Avenue Coach Co., Inc., 171 Misc. 707, at page 710 (N. Y. App. Term, 1st Dept., July, 1939) 24
Wood *v.* People, 59 N. Y. 117, 122 31

Statutes and Authorities Cited

	PAGE
Judicial Code, Section 240 (a)	13
New York Civil Practice Act, Section 789—formerly Section 791	3, 16, 17
State of Florida Constitution, Section 12 (Declaration of Rights)	18, 19
United States Constitution, Fifth Amendment	3, 8, 9, 12, 13, 15, 18, 19, 20
Wigmore on Evidence	
2nd Edition, Sections 287-288	34, 35
2nd Edition, Sections 1041-1042	23
2nd Edition 1923, Section 2261	23

Exhibits Referred To

Govt. Exhibits	Introduced in Evidence* Record Pages	Printed at Record Pages
95	1027, 1234-1273	1588-1596
95A	1027, 1234-1273	1597-1603
95B	1027, 1234-1273	1604-1607
100	1136, 1234-1273	1613-1615
101	1136, 1234-1273	1616-1619
102A to E	1147, 1234-1273	1620-1628

* The first number represents the page where the exhibit was marked for identification; the last figures embrace the Colloquy in Chambers between Court and Counsel when the Exhibits were marked in Evidence.

Supreme Court of the United States

OCTOBER TERM, 1943

SAMUEL H. FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel H. Feldman, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (No. 180, October Term, 1942) entered on June 24, 1943.

History of Case

This case arose in the United States District Court, Southern District of New York, where petitioner was indicted on August 10, 1940, charged with the offense of having used the mails in aid of a scheme to defraud (pp. 2-14). The case was tried before Honorable Bascom S. Deaver, District Judge of the Middle District of Georgia, sitting temporarily in New York, and a jury, from June 12, 1942, to July 8, 1942. Petitioner was found guilty and was sentenced, on July 9, 1942, to a term of imprisonment of five years and five years probation thereafter (pp. 20-21; 1510-1). The sentence of imprisonment of five years

was the maximum sentence on any one substantive count in the indictment. Application for bail was denied (p. 1511), and your petitioner was thereupon and has since been imprisoned under the said sentence.

On appeal to the United States Circuit Court for the Second Circuit, the judgment of conviction was affirmed by a divided court. The appeal was argued on February 9, 1943, and was decided eighteen weeks later—on June 8, 1943. The order of affirmance was entered June 24, 1943 (p. 1678). The majority opinion in the Circuit Court of Appeals was written by Circuit Judge Thomas W. Swan (pp. 1665-1675), and the dissenting opinion by Circuit Judge Charles E. Clark (pp. 1675-1677). Neither opinion has as yet been officially reported.

Summary Statement of the Matter Involved

The indictment charged the defendant with a scheme to defraud by means of "kiting" checks. In essence, it was alleged that petitioner in New York City and elsewhere cashed checks drawn on an account in a bank in Michigan in which there were insufficient funds and that he, thereafter, cashed additional checks and wired to the bank the cash proceeds of the latter items in order to cover the earlier checks, petitioner relying on the usual passage of four days from the date of cashing to that of clearance of each check. It was alleged that petitioner continued this practice from August, 1936 to the date of the filing of the indictment in August, 1940. On the trial the Government claimed only three alleged victims, namely, Essex House, Edward S. Reynolds and Stout & Co. (pp. 1500, 1). It was and is petitioner's position that there was no scheme to defraud since the three alleged victims were fully conversant with and aware of the fact

and had not been misled or deceived by petitioner at all. As stated by Judge Clark, at the very opening of his opinion:

> "• • • There was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished." (p. 1675).

Questions Involved

Several important questions of law are clearly presented by the record in this case:

(1) Whether petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence, as part of the prosecution's direct case, over petitioner's timely objection, of his testimony in supplementary proceedings before various courts of the State of New York, which testimony was compulsory and obtained pursuant to an immunity statute of the State of New York (New York Civil Practice Act, Section 789—formerly Section 791)?

Petitioner did not take the stand to testify in his own behalf. Nevertheless, and as part of its direct case, the Government introduced testimony of petitioner's examinations in supplementary proceedings (pp. 1131-1149; 1588-1607; 1613-1628; Government Exhibits 95, 95-A, 95-B, 100, 101 and 102-A through E). The prosecutor used this compulsory testimony upon the trial to prove, through petitioner's own involuntary admissions, two vital parts of the prosecution's case: (a) petitioner's inability to meet the "kited" checks referred to in the indictment; and (b) that petitioner was "kiting" checks in the manner and under the scheme charged in the indictment.

That this evidence, consisting of the self-incriminating testimony of petitioner, was most vital to the Government's affirmative case and extremely prejudicial to petitioner is conceded by the majority in its opinion, for Judge Swan wrote, in connection with the point raised by petitioner that the admission of such evidence was a violation of his constitutional privilege under the Fifth Amendment, as follows:

> "If the objection was well taken, the judgment must be reversed * * *." (p. 1669)

The introduction of this testimony into evidence occurred towards the end of the prosecution's case. It took up approximately one and a half days of court time. Moreover, the matters therein contained were strongly commented upon by the prosecutor in his summation, notwithstanding continued objection by petitioner (pp. 1234; 1463-1466).

(2) Whether petitioner was not deprived of a fair trial in view of the numerous errors committed and permitted by the trial court, despite petitioner's timely objection and exception, some of which errors are pointed out in both the majority and minority opinions of the Circuit Court?

(a) *Re cross-examination of witnesses*

After the prosecution had attempted to prove through direct examination of the witnesses Miller and Goetz, the two partners of Stout & Co., that they had been defrauded by petitioner (pp. 761-776; 840-855; 907-912), the latter was not permitted to cross-examine these witnesses as to their prior statements and acts relating to the very crime with which petitioner was charged, which statements and

acts were inconsistent with and contradictory to their direct testimony, and thus to discredit their testimony (pp. 973-978; 1012-1026). The minority opinion asserts that this error alone, this deprivation of petitioner's basic right of cross-examination, warranted reversal (p. 1676). The majority opinion (pp. 1674-5) admits that the District Court's rulings were erroneous but claims that they could not have affected the jury's verdict despite the fact that (1) of all three transactions in question, by far the largest loss was suffered in the Stout & Co. transaction; (2) the testimony given by these witnesses consumed one and a half court days and 682 folios of testimony; (3) the dealings with Stout & Co. were a substantial part of the alleged scheme of petitioner to defraud; (4) this transaction was stressed in the summation of the prosecutor and was the only one of the three in question which was specifically named and discussed by the trial judge in his charge to the jury (pp. 1483-1485).

(b) *Re Emanuel & Co. transaction*

The Government offered, on its direct case, evidence of an alleged illegal act on the part of petitioner which occurred during the early part of the year 1930 (pp. 995-7), some six or seven years before the crime to defraud charged in the indictment, and entirely unrelated to the crime alleged.

During 1930, petitioner had a margin stock trading account with Emanuel & Co., stockbrokers in New York City. In connection with a call for margin, petitioner deposited in his said margin account a $50,000 draft which was subsequently dishonored. At the time petitioner had a substantial equity in the account; moreover, previous drafts of smaller amounts had been honored (p. 989).

During the time that petitioner was in default there was a severe reaction in the market and largely as a result of this a loss to Emanuel & Co. amounting to $57,000 occurred (pp. 1047-1050). No claim was made by the prosecution that this was one of a series of continuous acts involving check "kiting".

Both the majority and minority opinions of the Circuit Court express serious doubts as to the admissibility of this evidence. The majority, however, decided that its admission was not prejudicial despite the fact that it was referred to constantly in the United States attorney's summation and was characterized by him as showing "the common scheme and plan this man has used since 1930" (p. 1468); despite the fact that this proof was in its very nature highly prejudicial and clearly inadmissible (pp. 985-7) and was presented near the very end of the Government's case; despite the fact that this testimony comprised some 135 pages of the record, took one and a half trial days to present, and in essence attempted to show that the defendant in 1930 caused a loss of $57,000 to the stock brokerage firm of Emanuel & Co. (pp. 985-1011; 1033-1130).

(c) *Re bill of particulars*

The Government attempted to prove that petitioner had defrauded only three individuals, namely, Essex House, Edward S. Reynolds and Stout & Co. Nevertheless, and over objection, the court sent to the jury, at the very inception of its deliberations, the Government's bill of particulars, embodying the names of 115 alleged victims (p. 1488). The prosecutor had conceded (pp. 1560-1) that only three of the persons named in the indictment and the bill of particulars had been the subject of testimony adduced at the trial. Consequently the prosecutor offered to limit

the bill of particulars to those three out of the 115 persons named in the bill (pp. 1500-1). The trial court, however, refused thus to limit the bill and sent it to the jury in its entirety (p. 1501). The trial court charged the jury in such a manner that it might return a verdict based upon the defrauding of any one of the 115 named persons (p. 1506). By this action alone, the court erroneously created an impression in the jury's mind of wholesale wrongdoing and the defrauding of a multitude of persons on the part of petitioner.

(d) *Re charge to the jury.*

The trial court, throughout its charge, instructed the jury that it could bring in a verdict of conviction against petitioner if he had devised a scheme to obtain money under false pretenses (pp. 1473, 1477-9, 1483, 1484, 1487-8). Petitioner was not indicted for such a crime (pp. 2-14). At the completion of the charge, and in chambers, counsel for petitioner called the attention of the court to this error. The trial judge then admitted that he had not read the indictment before or during the trial and that he had charged the jury incorrectly as to the essential nature of the crime set forth in the indictment (pp. 1506-7). When the trial judge finally read the indictment and attempted to correct his charge in the light thereof, petitioner requested (this) specific charge to the jury:

> "• • • I ask your Honor to charge the jury that they cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment." (p. 1507)

The court refused to give petitioner the benefit of the requested charge (pp. 1507-8) despite the necessity therefor

which was created by the judge's own admitted error (pp. 1506-7).

(e) *Re other and numerous errors*

Numerous other errors were committed by the trial court, all of a serious and prejudicial character. Among them, but not limited to the same, were the inequitable and different treatment of counsel, referred to in Judge Clark's dissenting opinion (p. 1677), the incorrect charge of the trial judge on several other vital elements of the case (pp. 1493-5), and the prejudicial remarks and questions by the prosecutor permitted by the court, reference herein being particularly made to the improper comment by the prosecutor upon petitioner's failure to call a witness (p. 1469). The existence of such further error is called to the attention of the court, but details thereof are not herein set forth because of the limitation of space.

Reasons for Granting the Writ

The questions presented are of great public importance. They involve a determination of fundamental civil liberties which have not been but should be settled by this court.

The violation of the Fifth Amendment of the Constitution of the United States by reason of the compulsory self-incrimination of petitioner was caused in this case by the admission in evidence of the compulsory testimony given by petitioner in examinations in the courts of the State of New York. However, the fundamental problem herein far transcends the use of compulsory testimony obtained in supplementary proceedings. It extends to all testimony compulsorily adduced in one jurisdiction, whether in supplementary proceedings, in grand jury proceedings or in any one of the myriad immunity statutes, which testimony is then subsequently offered into evidence

in a criminal proceeding in another jurisdiction to establish the guilt of the very defendant who had theretofore been compelled to give such testimony. The question as presented, therefore, goes to the very essence of one's right against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States since this testimony was offered and received in evidence as part of the Government's direct case and to prove the essential elements constituting the crime.

This court has already decided, and it is established law, that a party may not refuse to answer a question in one jurisdiction because his answer may incriminate him in another and different jurisdiction. (*Jack* v. *Kansas,* 199 U. S. 372 (1905); *Brown* v. *Walker,* 161 U. S. 591 (1895); *U. S.* v. *Murdock,* 284 U. S. 141.) On the other hand, this court has never passed upon the question as to the admissibility in the second jurisdiction of the testimony which it has stated could be compelled to be given in the first jurisdiction. This court has stated that it was unwilling to believe that a prosecutor would offer testimony which had been thus obtained under compulsion. (*Jack* v. *Kansas, supra.*) In the case at bar, not only did the prosecutor offer such testimony but he actually relied upon it as his most important, effective and prejudicial testimony.

As appears from the opinions of the Circuit Court below, despite intensive research on the part of counsel for petitioner and counsel for the Government and despite intensive research by the Circuit Court, which deliberated for some eighteen weeks, there is no Federal decision directly on the question. Judge Swan wrote as follows:

> "It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority." (p. 1671)

Judge Clark, dissenting, wrote in this vein:

> "The question of use in the Federal courts of defendant's examination in the State supplementary proceeding, absolutely privileged on a State prosecution, is, as the opinion shows, not settled." (p. 1676)

The only decision of a court of high authority to be found is *Clark* v. *State*, 68 Fla. 433. This decision sustains petitioner's contention that his right against self-incrimination had been violated and this decision, had it been followed by the majority, would have resulted in a reversal of the conviction.

The merit of petitioner's contention and of the *Clark* case cited above as well as the great danger involved in the acceptance of the rule of the majority, have been most aptly stated by Judge Clark in his dissenting opinion as follows:

> "I believe, however, that *Clark* v. *State, supra*, states the better rule, unless we definitely wish to trap persons between the interstices of the overlapping state and federal sovereignties. Cases such as *United States* v. *Murdock, supra*, show merely that defendant could not have refused to answer in the state proceedings; they do not hold that the immunity promised him can be substantially nullified by the wide scope of the federal mail fraud and conspiracy statutes. In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by *McNabb* v. *United States*, 63 S. Ct. 608, 613." (pp. 1676-7)

This question is of such importance and so fundamental that the governing rule should not be established by a divided vote of the judges of one circuit but should, quite to the contrary, be decided by this court and become a rule of universal application throughout the country.

A further fundamental question involved is the right of a defendant to a fair trial. The decision of the majority of the court below in effect is that, no matter how many or how serious the errors of the trial judge may be, it will disregard these errors and the trial procedure adopted by the District Court and send the defendant to jail if they believe him to be guilty of the charge. The danger attendant upon such a viewpoint is evident on the statement thereof. It is all the more striking in the instant case in view of the fact that one of the three judges of the Circuit Court had very serious doubts as to the defendant's guilt under the charge set forth in the indictment. Dissenting Judge Clark wrote in this respect as follows:

> "I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial, particularly in view of the natural prejudice which defendant's conduct tended to inspire. But that care was not exercised." (p. 1675)

A clear declaration by this court as to a defendant's right to a fair trial and the limitation of the authority of Circuit Court judges to disregard error would necessarily have a salutary effect upon trial procedure in criminal cases in all the district courts of the country.

In light of the above, petitioner submits:

(1) The Circuit Court of Appeals for the Second Circuit has, in this case, decided an important question

of Federal and Constitutional law, limiting the scope and applicability of the Fifth Amendment of the Constitution of the United States, which has not been, but should be, settled by this court.

(2) Said Circuit Court of Appeals has decided other vital questions in a manner which is in conflict with applicable decisions of this court, all of which more fully appear from the foregoing statement of the questions herein involved.

(3) The said Circuit Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court as to constitute approval by it of the conduct of the trial court in depriving petitioner of a fair trial, thus calling for the exercise of this court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

SAMUEL H. FELDMAN,
By JAMES MARSHALL,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943

SAMUEL H. FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended. The judgment of conviction of the Circuit Court was entered on June 24, 1943.

Statement of the Case

The statement of the case is contained in the petition.

Specification of Errors

(1) Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence, as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State

of New York, and the Circuit Court of Appeals erred in sustaining this violation.

(2) The Circuit Court erred in sustaining the District Court's deprivation of petitioner's basic right of cross-examination of the witnesses Miller and Goetz, the two partners of Stout & Co., on vital parts of the Government's case.

(3) The Circuit Court erred in holding that the transactions in 1930 with Emanuel & Co. were admissible in evidence.

(4) The submission to the jury of the Government's bill of particulars with the names of 115 alleged victims constituted reversible error.

(5) The erroneous charge of the trial court to the jury that petitioner was charged with and could be convicted of a crime not set forth in the indictment, and its refusal to grant petitioner's request for a specific charge correcting the same, constituted reversible error.

(6) The errors of the trial court and the conduct of the prosecutor deprived petitioner of a fair trial, and the Circuit Court of Appeals erred in failing to reverse petitioner's conviction.

ARGUMENT

I

Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation.

The Government introduced at the trial testimony compulsorily given by the petitioner on six occasions in the courts of the State of New York in supplementary proceedings under an immunity statute. This compulsory testimony, composed of the petitioner's own involuntary admissions, was used to establish what was perhaps the most vital portions of the prosecutor's case, to wit, (a) petitioner's inability to meet the "kited" checks referred to in the indictment; and (b) actual "kiting" of checks by the petitioner in the manner and under the scheme charged in the indictment.

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In accordance with that constitutional right, the defendant in the case at bar chose to remain mute and elected not to testify at his trial. Nevertheless, through the admission of the supplementary proceedings examinations, he was, in effect, compelled to be a witness against himself in violation of the Fifth Amendment.

The constitutional protection against self-incrimination is a sacred right guaranteed by the Bill of Rights. It has been held that it should be "liberally construed" in favor of a defendant.

Boyd v. *U. S.*, 116 U. S. 616, 635 (1885);
Safarik v. *U. S.*, 62 F. (2d) 892, 897 (C.C.A. 8th, 1933).

In the State of New York a judgment-debtor can be compelled to appear in court and give testimony concerning his affairs under oath. He may not refuse to testify under penalty of a contempt order resulting in fine and/or imprisonment (New York Civil Practice Act, Section 789).

However, such testimony cannot be used against him in any criminal proceeding in the State (*People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927)). The prohibition against its use in any way is so strong that its admission is reversible error even though no exception was taken.

People v. *Doyle*, 58 Hun 535 (N. Y. 1890).

It is not claimed here, nor was it claimed in the Circuit Court below, that the New York State statute immunized the petitioner against prosecution in the Federal court. However, by reason of that state statute petitioner was compelled to testify in the New York court no matter how incriminating such testimony might be. His right to refuse to answer in that proceeding on the ground of self-incrimination under the Fifth Amendment could not be raised.

Jack v. *Kansas*, 199 U. S. 372 (1905).

In *Jack* v. *Kansas*, *supra*, a state anti-trust statute compelled testimony to be given in the state court and

provided an immunity similar to Section 789 of the New York Civil Practice Act referred to above. The appellant had refused to testify nevertheless and had raised his constitutional privilege, claiming that the state immunity statute did not protect him against prosecution under the Federal Anti-Trust Act. The Kansas court held him in contempt and sentenced him to imprisonment. This court affirmed the judgment of the state court, on the ground that the danger of a Federal prosecution was remote and that it did not believe that the evidence would be availed of by the Government for the purpose of prosecution.

A similar rule has been laid down where there is a Federal immunity statute and an attempt is made to refuse to answer under a claim of privilege against self-incrimination under the state law. Thus in *Brown* v. *Walker*, 161 U. S. 591 (1895), a witness had refused to testify before the Interstate Commerce Commission on the grounds of the constitutional privilege against self-incrimination. There was a Federal immunity statute protecting against the use of such testimony in the Federal courts. The witness claimed that he might be subject to prosecution in the state courts. Upon his refusal to answer, he was adjudged to be in contempt and was taken into custody. This court affirmed the judgment of the court below. It held that

> "the danger to be apprehended must be real and appreciable • • • not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." (pp. 599-600)

The court regarded the Federal prosecution as "a merely remote and naked possibility."

It is the use in the Federal court below upon the trial of petitioner, over his objection, exception and claim of violation of his constitutional rights, of his testimony in the supplementary proceedings in the courts of the State of New York under penalty of fine and/or imprisonment, given at a time when, under prevailing decisions of this court, he had no choice, that is assigned here as error.

There is almost a complete absence of specific authority in the entire country on the exact point herein raised, to wit, the admissibility in one jurisdiction of testimony theretofore compelled in another jurisdiction under an immunity statute of that other jurisdiction.

Now, the issue has been fairly and squarely raised. That danger which the court in *Jack* v. *Kansas* (*supra*) believed was "too remote" and which the court in *Brown* v. *Walker* (*supra*) regarded as a "remote and naked possibility of imaginary and unsubstantial character", has come to pass. That type of evidence which this court could not believe would ever be availed of by the Government since it was under compulsion was used by the prosecution in the case at bar to effect the conviction of this petitioner. Its most prejudicial parts were emphasized on summation by the United States Attorney.

There is only one case in the entire country, a decision of the highest court of the State of Florida, *Clark* v. *State*, 68 Fla. 433, 67 So. 135 (1914), which has passed upon this important constitutional question, and that decision supports the petitioner's contention herein.

In the *Clark* case, *supra*, the defendant was indicted in the state court for the crime of embezzlement. Section 12 of the Constitution of the State of Florida is the counterpart of the Fifth Amendment of the Constitution of the United States relating to self-incrimination. Clark,

a bankrupt, had testified at the first meeting of creditors in the Federal court pursuant to the Bankruptcy Act. Under another section of that Act he was given immunity by reason of such testimony. The state prosecutor in the subsequent embezzlement trial introduced into the evidence notes taken by a court reporter at the bankruptcy hearing setting forth the testimony of Clark. On appeal, this was assigned as error. The Supreme Court of Florida held that the admission of that testimony, standing alone, was reversible error. It stated at page 436:

> "To permit the introduction of such proffered testimony would be violative of the provisions of Section 12 of the Declaration of Rights in our State Constitution in compelling, indirectly at least, the defendant in a criminal case to be a witness against himself."

In connection with the *Clark* case it is to be noted that the court there, just as the petitioner does here, specifically disclaimed any reliance upon a possible doctrine that the immunity statute of one forum can give immunity from prosecution in another forum. The decision was based wholly upon the constitutional protection of the state Bill of Rights, which is the exact equivalent of our Fifth Amendment.

The majority below was unable to find any decision directly supporting its ruling that the testimony was admissible. However, they apparently relied on a series of cases in this court where it has been held that a person may not raise a privilege against self-incrimination in one jurisdiction upon the ground that his answers may tend to incriminate him under the laws of another and different jurisdiction.* Obviously that is not the case at

* The majority cites the following cases: *U. S.* v. *Murdock*, 284 U. S. 141; and *Hale* v. *Henkel*, 201 U. S. 43, at page 69.

bar. Here the problem is the admissibility in that other jurisdiction of the very testimony which defendant had theretofore been compelled to give in the first jurisdiction. That problem has been raised only by *Clark* v. *State, supra,* and decided in petitioner's favor.

The majority of the Circuit Court below argued that even if there were a violation of the Fifth Amendment,

> "the record here fails to show wherein the appellant suffered prejudice." (p. 1672)

It is impossible to reconcile such an attempted justification for the affirmance of the judgment of the District Court with other portions of the opinion of the majority wherein they stated that

> "if the objection were well taken the judgment must be reversed" (p. 1669)

and wherein they further argued that

> "indeed, the appellant's fraudulent intent was proved out of his own mouth by the introduction of testimony given by him in supplementary proceedings conducted by judgment creditors in courts of the State of New York." (p. 1668)

A mere cursory reading of the damaging and highly inflammatory testimony given by the petitioner under compulsion in the state courts will clearly spotlight the prejudice that the majority below presumably was unable to find.

Apparently unconvinced of the soundness of their general ruling on this point, the majority below isolated one out of the six examinations in supplementary proceedings, that one taken in July, 1937 (p. 1672), attempted to justify its particular admission into evidence, and then brushed aside the remaining and additional supplementary

proceedings at later dates (Government Exhibits 95, 95A, 95B, 100, 101; pp. 1597-1607, 1613-1619) upon the ground that they could have had no substantial effect upon the jury's verdict.

A reading of these other supplementary proceedings will clearly establish that any one of them, and certainly all of them together, must have had a tremendous effect upon the jury (pp. 1597-1607; 1613-1619). However, even the argument for the admissibility of the testimony in the July, 1937, supplementary proceeding falls of its own weight upon even the slightest analysis. The majority states that petitioner could not have had a privilege in July, 1937, against testifying as to a crime he did not commit until August (p. 1672). A reading of the indictment (pp. 2-14) shows that the scheme to defraud in question was alleged to commence on July 1, 1936, and to continue up to and including the date of the filing of the indictment, to wit, August, 1940. At the time the petitioner testified in supplementary proceedings in the state courts in July of 1937 he was, according to the indictment and the proof elicited at the trial below, right in the midst of the crime in question. In fact, the evidence of his testimony of July, 1937, was admitted for the very purpose of proving an essential element of the actual crime charged (pp. 1463-4).

Again reliance is placed on the fact that the Government had delayed the indictment until August, 1940, and had thereby allegedly given petitioner immunity against prosecution for offenses committed prior to August, 1937, and therefore had rendered admissible the testimony in question. The fact is that the indictment charged, and the jury found, that the defendant, from January 1, 1936, up and through August of 1940, devised a scheme to defraud and mailed certain letters in furtherance

thereof. It is difficult to understand what sort of immunity was given by the Government's failure to indict sooner. But there can be no gainsaying that essential, vital and highly prejudicial evidence tending to prove an essential element of the Government's case was established by means of that compulsory testimony theretofore given in the state courts. Consequently there was a clear deprivation of the defendant's constitutional right against self-incrimination. Judge Clark, in the dissenting opinion below, states unequivocally:

> "In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by *McNabb* v. *United States,* 63 S. Ct. 608, 613." (p. 1677)

While the specific objectionable testimony in the case at bar was obtained in New York State through supplementary proceedings, the problem is one which far transcends this one defendant and this type of compulsory testimony. The question might well have arisen and undoubtedly will arise in the future as to the admissibility in one jurisdiction of testimony obtained in another jurisdiction through Grand Jury proceedings or through any one of the myriad of proceedings whereby testimony can be taken compulsorily under an immunity statute. In essence, it goes to the very foundation of our judicial precepts that a defendant should not be convicted upon the basis of compulsory self-disclosure. The rationale of this basic doctrine is well stated by the leading authority on evidence in this country:

> "Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer *morally* thereby." *Wigmore on Evidence* (2nd Ed. 1923), Section 2261.

Casting aside the novel and ingenious attempt on the part of the majority below to avoid the natural result of reversible error caused by a clear violation of the constitutional provision against self-incrimination, the plain fact is that testimony was admitted in the Federal Court which had theretofore been taken in the State Court compulsorily under a state immunity statute, and the petitioner's conviction in the Federal Court was effectuated by means of that compulsory self-disclosure.

II

The Circuit Court erred in sustaining the District Court's deprivation of petitioner's basic right of cross-examination of the witnesses Miller and Goetz, the two partners of Stout & Co., on vital parts of the Government's case.

It would serve no purpose to argue this point at length, for even the majority opinion of the Circuit Court itself concedes that the curtailment of petitioner's right of cross-examination was error (pp. 1674-5). (*Wigmore on Evidence*, 2nd ed., Sections 1041-1042; *Judson* v. *Fielding*, 227 App. Div. 439, aff'd 253 N. Y. 596; *Pierce* v. *Sanden*, 29 Fed. 2d, 87, 90 (C.C.A. 8th Cir.); *Barrett* v. *N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 663, 670; *Lilly* v. *Hamilton Bank*, 178 Fed. 53, 59 (C.C.A. 3rd Cir.)), all cited in the majority opinion, as well as *Chicago, Milwaukee &*

St. Paul Railway v. *Artery*, 137 U. S. 507, at page 519 (1890), and *Wolfe* v. *Madison Avenue Coach Co., Inc.*, 171 Misc. 707, at page 710 (N. Y. App. Term 1st Dept., July, 1939).

The dissenting judge below, in discussing the effect of the erroneous ruling of the trial court, declared:

> "In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal." (p. 1676)

The majority, on the other hand, after pointing out in some detail the justification for the position of petitioner, attempted to dismiss the vital effect of the error by stating that in their opinion it could not have affected the jury's verdict.

Petitioner has set forth succinctly in that portion of his petition devoted to this particular matter sufficient facts to show clearly the falsity of any such conclusion.

Any pretense that a defendant must be afforded a fair trial becomes a sham and a delusion if the conviction below is allowed to stand despite the fact that petitioner was completely deprived of any opportunity to attack in a most vulnerable spot the veracity of the two chief Government witnesses on a vital portion of the prosecutor's case.

III

The Circuit Court erred in holding that the transactions in 1930 with Emanuel & Co. were admissible in evidence.

The gist of the Government's charge in the indictment and the proof was that Sam Feldman was "kiting" checks. The record of the trial is largely made up of

proof of the cashing of checks almost daily from July, 1936, to April, 1938, the funds from subsequent checks being used to cover the clearance of checks previously issued. This was made possible by the fact that it took four days or more for the checks drawn on the Michigan bank to clear. There was no "kiting" of any kind involved in the transaction with Emanuel & Co. The situation was simply one where petitioner, in 1930, operated a margin account with a stock brokerage firm and, during its course, deposited a draft as margin which was subsequently dishonored. That was at least six years before the occurrence set forth in the indictment in this case. The transaction in question was not probative of any fraudulent intent as to the offenses charged in the indictment, in essence a scheme to defraud by means of "kiting" checks.

As a general rule, in a criminal case, evidence which tends to show that the defendant has committed another independent offense may not be introduced to prove the commission of the crime charged (*Boyd* v. *U. S.*, 142 U. S. 450 (1891)). There are, it is true, exceptions to this general rule. But these exceptions are circumscribed by certain recognized specific requirements. Thus where intent is in issue, evidence of another offense may be admissible to prove intent provided it is (1) so connected in time *and* (2) so similar in other respects that the commission of the similar acts is clearly probative of the defendant's intent on the main charge.

It is the rule in all jurisdictions that the similar acts must occur at or near the time of the offense charged in the indictment and not to be too remote.

Wolf v. *U. S.*, 290 Fed. 738 (C.C.A. 2nd 1923);
Simpkins v. *U. S.*, 78 Fed. (2nd) 594 (C.C.A. 4th 1935);

Jianole v. *U. S.*, 299 Fed. 496 (C.C.A. 8th 1924);
Harris v. *U. S.*, 273 Fed. 785, 791 (C.C.A. 2nd 1921), certiorari denied, 257 U. S. 646 (1921);
Cf. *Packer* v. *U. S.*, 106 Fed. 906 (C.C.A. 2nd 1901);
Kercheval v. *U. S.*, 12 Fed. (2nd) 904 (C.C.A. 8th 1926), rev. 274 U. S. 220 (1926) on other grounds.

In *Wolf* v. *U. S., supra,* the Circuit Court of Appeals for the Second Circuit held that an offense which occurred almost two years after the crime charged in the indictment was too remote to be admissible. The court italicized and emphasized the fact that the evidence admitted concerned an offense which occurred *almost two years* after the period of the indictment.

In *Simpkins* v. *U. S., supra,* evidence of sales or evidence of other offenses starting *three years* before the indictment was held to be inadmissible.

In *Jianole* v. *U. S., supra,* it was held that an offense committed *a year and a half* before the period in the indictment was too remote in point of time to be admissible.

In *Packer* v. *U. S., supra,* the Second Circuit was in some doubt as to whether an offense occurring *only one year* before the charge in the indictment was admissible.

In the case at bar there was an interval of some *six to seven years* between the Emanuel transaction and the acts charged in the indictment.

During the course of the discussion in the *Packer* case, the court said at page 909:

> "The most serious criticism made upon the ruling admitting evidence in regard to the previous business transactions of the accused is because of the remoteness of time at which those transactions

took place. Evidence of offenses not connected with the one for which the accused is on trial is generally inadmissible. Ordinarily it does not tend to prove him guilty of the particular offense and is exceedingly prejudicial in affecting his character with the jury."

Entirely apart from any question of remoteness in time, it is necessary that the other offense proven be so logically and plainly similar to the act charged in the indictment as to be logically and plainly probative of the defendant's present intent.

Boyd v. *U. S.*, 142 U. S. 450 (1891);
Erber v. *U. S.*, 234 Fed. 221 (C.C.A. 2nd 1916);
MacDonald v. *U. S.*, 264 Fed. 753 (C.C.A. 1st 1920);
Paris v. *U. S.*, 260 Fed. 529 (C.C.A. 8th 1919);
Niederluecke v. *U. S.*, 21 Fed. (2nd) 511 (C.C.A. 8th 1927).

The courts are aware that this type of evidence is very prejudicial and usually results in unfair surprise and embarrassment to the defendant.

In *Fish* v. *U. S.*, 215 Fed. 544 (C.C.A. 1st 1914) at page 549, the court said:

"Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case."

In *Niederluecke* v. *U. S.*, *supra*, the court in referring to evidence of this nature said at page 513:

"• • • From the nature and prejudicial character of such evidence, it is obvious that it should not be received, unless the mind plainly perceives

> that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner."

In *Shea* v. *U. S.*, 236 Fed. 97 (C.C.A. 6th 1916), the conviction of defendant was reversed as a result of the admission in evidence of an alleged similar offense. In that case a so-called "Kehoe" incident consisting of evidence of an alleged fraudulent mining stock scheme was admitted into evidence over objection and exception. Although this incident occurred practically at the same time as the crime charged in the indictment, its admission was held to be reversible error because it showed at most merely a general "disposition" to fraud (see p. 104). The Emanuel transaction herein at most showed no more than that. The "sameness" necessary to be probative of intent is entirely missing.

The majority cites its own case of *U. S.* v. *Seeman*, 115 Fed. 2nd 371 (C.C.A. 2nd 1940) as authority for the proposition that the transaction in the Emanuel case was sufficiently similar in character to be admissible on the issue of intent. The essence of that decision, sustaining the proposition that identity of all factors is not required to render similar offenses admissible, is that where the crime charged is one involving interstate movement of stolen bonds a similar offense would involve a stolen bond situation purely local in character. Its analogy lies in the rule that in a mail fraud case a similar offense might be admissible even though the mails had not been used.

See also:

Quig v. *U. S.*, 33 Fed. (2d) 820 (C.C.A. 3rd 1929).

The admission of the Emanuel transaction was exceedingly prejudicial to the petitioner. The length of time

devoted to its proof (pp. 985-1011; 1033-1130), the large sum of money involved, the emphasis placed upon it by the Government, the fact that it came near the end of the Government's case, the allusion to it in the summation by the Government (p. 1468) as well as in the judge's charge, all these gave it great importance and stature. It was offered on the Government's direct case. *The petitioner did not take the stand, nor did he present any character evidence. Nevertheless, this alleged, fraudulent isolated transaction occurring six to seven years prior to the beginning of the indictment period, ten years before the filing of the indictment and twelve years prior to the trial, was admitted and allowed to be considered by the jury in determining the guilt or innocence of this petitioner.*

Its admission, standing alone, should result in a reversal of this conviction.

IV

The submission to the jury of the Government's bill of particulars with the names of 115 alleged victims constituted reversible error.

The court by its ruling on the bill of particulars and by its charge in connection therewith in effect gave the jury untrammeled discretion to convict the petitioner if it found a scheme to defraud any one of the 115 persons. As shown in the petition, by the prosecutor's own admission there was no evidence as to 112 of these alleged victims.

For aught we can tell, the conviction was based upon a finding that there was a scheme to defraud one of the 112 alleged victims as to whom admittedly there is a complete failure of evidence. Certainly petitioner should not

be deprived of his liberty for five years by any such procedure wherein it cannot be clearly determined just what he had been convicted of. Under our trial procedure the very least that should have occurred was that only those matters upon which a conviction could stand be submitted to the jury. In a very recent decision of the State of New York that exact type of situation occurred and resulted in a reversal.

In *People* v. *Levine*, 265 App. Div. 513 (1943) defendant had been convicted of the crime of perjury in the first degree under an indictment alleging seven different instances of false swearing, as to four of which no supporting evidence had been adduced. A request to allow consideration by the jury of only those specific charges concerning which evidence was adduced was made and refused.* This was held to be error, the court writing as follows:

> "Though defendant makes no complaint concerning that portion of the court's charge which permitted the jury to find defendant guilty of perjury if any one of the seven assignments stated in the indictment was supported by the evidence, he urges that the submission of the 4th, 5th, 6th and 7th assignments was error. As to these four specifications, the evidence did not support the charge of false swearing. Where the attention of the court on the trial was specifically called to the question and the court upon objection by the defendant refused to withdraw from the consideration of the jury the assignments which had not been sustained by the proof, this court cannot disregard the error. Particularly is this true since at the trial the prosecutor in effect conceded that these

* Note that in the case at bar a request to limit the bill to the three purported victims—Essex House, Stout & Co. and Edward S. Reynolds—was made and refused.

> specifications should not be submitted to the jury. (*Wood* v. *People*, 59 N. Y. 117, 122; *People* v. *Root*, 94 App. Div. 84, 91)."

At the very least, by submitting these 115 names (supposedly those described by the Grand Jury in its indictment as "too numerous to mention specifically") the court erroneously created a most prejudicial situation to petitioner wherein the jury was led to believe that petitioner had indulged in wholesale wrongdoing. This must result in a reversal because of its effect on the jury's mind. Identical in principle is the case of *Booth* v. *U. S.*, 139 Fed. 252 (C.C.A. 2nd Cir. 1905) wherein the court, reversing the conviction in that case, wrote, at page 256:

> "The error must have been prejudicial to the defendant. It must have helped to induce a belief in the jury's mind that the defendant had carried on the same scheme in scores of instances to the extent of thousands of dollars."

V

The erroneous charge of the trial court to the jury respecting the crime with which petitioner was charged and its refusal to grant petitioner's request for a specific charge correcting its error constituted reversible error.

The trial court, throughout its charge, instructed the jury that it could bring in a verdict of conviction if it found that petitioner had devised a scheme to obtain money under false pretenses. Petitioner had not been indicted for that crime. This error was specifically called to the court's attention by defense counsel. After a

further charge by the trial judge which still left the matter in doubt (p. 1507), petitioner's counsel requested a specific charge to the jury as follows:

> "I ask your Honor to charge the jury that they cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment." (p. 1507)

The court refused to instruct the jury in accordance with such request.

The refusal of the court to restrict the consideration of the jury to the single crime of a scheme to defraud was reversible error. In *Beck* v. *U. S.*, 145 Fed. 625, 626 (C.C.A. 2d, 1906), at page 626, the court wrote:

> "The effect of the instruction was to authorize the jury to convict the defendant of an offense for which he was not upon trial. * * * The defendant was on trial for one offense, and he may have been convicted of another."

In *Hass* v. *U. S.*, 93 Fed. 2nd 427 (C.C.A. 8th) the court, by Sanborn, C. J., at pages 434, 435, wrote as follows:

> "Thus, while charging a scheme to obtain, by means of certain false pretenses, a secret profit from the Foresters and its members as they should exist after merger, the government succeeded in proving a scheme whereby the defendants other than Parks were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from Parks upon completion of the merger.
>
> "Whether the breach of trust of which the defendants who were officers of the Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for them-

> selves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, * * * it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment."

Under the court's charge in the case at bar, the petitioner may well have been convicted of devising a scheme to obtain money by false pretenses and promises, a crime for which he was never indicted. Once again, just as in the bill of particulars point (see Point IV, *supra*), one is forced to speculate as to just what petitioner was convicted of. Indeed, under these circumstances it is hardly surprising that the dissenting judge concluded his opinion by stating:

> "* * * I must express my fear that defendant was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail." (p. 1677)

VI

The errors of the trial court deprived petitioner of a fair trial and the Circuit Court of Appeals erred in failing to reverse petitioner's conviction.

In addition to the specific errors of the trial court, disregarded or approved by the Circuit Court's majority opinion and more fully hereinabove discussed, there were additional errors of a serious nature.

1. For example, the prosecutor commented in his summation upon the failure of petitioner to produce as a witness the Florida attorney for one of prosecution's wit-

nesses, who had been mentioned in the testimony of the said witness (p. 661), to rebut a self-serving statement made by the latter. Not a word in the record indicates that petitioner was ever aware of the possibility of this attorney becoming an issue or that petitioner knew that such attorney existed before the testimony in question was given. Despite prompt request by counsel, the court refused to strike out the remarks of the prosecutor (p. 1469).

It is well established that comment by the prosecutor upon the failure of a defendant to call a witness, particularly under such circumstances, is reversible error (*Graves* v. *U. S.*, 150 U. S. 118 (1893); *Hamburg-American Steam Packet Co.* v. *U. S.*, 250 Fed. 747 (C.C.A. 2nd, 1928); *Rostello* v. *U. S.*, 36 Fed. 2nd 899 (C.C.A. 7th, 1927)).

The burden of proof is on the Government in a criminal case and the guilt of the defendant must be proven beyond a reasonable doubt. The defendant may choose to remain mute and he need not present any evidence at all to the jury; he may rest upon the Government's case.

No inference is allowable where the witness in question is available to both parties and is not in close relationship with the party who, it is claimed, should have called him.

> *Wigmore on Evidence*, 2nd Edition, Sec. 288;
> *Longacre* v. *Yonkers Railway*, 236 N. Y. 126 (1923).

The proposed witness was unknown to the petitioner, clearly not in any close relationship to him and was in fact more available to the Government, inasmuch as he was the attorney for the Government witness, Betty King (p. 661).

Furthermore, any untoward inference is clearly improper and unjustified where the testimony of the witness

will be comparatively unimportant and might well be dispensed with by a party on the general grounds of inconvenience (*Wigmore, supra,* Sec. 287). Production of this alleged witness would have required his being brought from Florida probably by plane, at great expense to the petitioner.

Furthermore, the testimony of this witness would have been inadmissible. A denial on his part of any conversation with Betty King would have been impeachment on a collateral matter and therefore inadmissible. Besides, any discussion between Miss King and this attorney would have been privileged communications.

In *Graves* v. *United States, supra,* the Supreme Court reversed a conviction where comment was made on the failure to produce a witness who would have been incompetent to testify.

The fact that the witness in question might have given relatively unimportant testimony makes the error graver. As the court said in the *Graves* case, *supra, the less value the testimony of the particular witness would have, the more prejudicial becomes the comment of the district attorney in calling the jury's attention to the failure to call that particular witness.* By his remark, the prosecutor undoubtedly created an impression in the minds of the jury that the petitioner was withholding testimony which would be unfavorable to him, and thereby he was raising an inference which under the law could not be raised. The *Graves* case said that it was the duty of the court, upon objection, to act upon the prejudicial remarks. In the case at bar the court specifically refused to strike them out when requested by the defense counsel (p. 1469).

This unwarranted and inexcusable statement and conduct on the part of the prosecutor, bolstered as it was

by the court's refusal to strike it from the record, constitutes serious prejudicial error, requiring a reversal of the judgment of conviction.

2. Then again, the court committed additional prejudicial error when it refused the petitioner's request to charge that, to constitute a scheme to defraud, the one whom it is sought to defraud must be ignorant of the facts constituting the scheme (pp. 1493-4).

Norton v. *United States*, 92 Fed. (2nd) 753 (C.C.A. 9th, 1937);
Milby v. *United States*, 109 Fed. 638 (C.C.A. 6th, 1901).

Petitioner's defense was to the effect that the alleged victims were not defrauded but to the contrary knew all the facts. The refusal of the trial judge to charge as requested was patent error prejudicial to petitioner.

3. Similarly, the court refused to charge that the party allegedly defrauded must not knowingly have taken part in the so-called scheme himself (pp. 1493-5).

4. In addition to the foregoing, the court treated defense and prosecution counsel differently; as stated by Judge Clark, "the former being required to state his proposed testimony at length in chambers, to be there ruled out for the most part, while the latter was allowed to present his claims as usual in the court room before the jury" (p. 1677).

Summary

Analyzing the case in its entirety, petitioner respectfully submits that he was not accorded a fair trial confined to the issues on which he was indicted. In seriatim:

(1) Vital portions of the Government's case were proven through testimony elicited under compulsion in the state courts.

(2) Petitioner was completely deprived of a vital right of cross-examination.

(3) A dissimilar and alleged illegal act occurring twelve years before the trial and absolutely unrelated to the crime charged in the indictment was submitted for the jury's consideration.

(4) An atmosphere of wholesale wrongdoing on the part of petitioner was created by the submission to the jury of the names of 115 alleged victims.

(5) The court charged the jury that petitioner could be convicted of a crime not alleged in the indictment and thereafter refused clearly to correct that error.

(6) Unwarranted, unfair and prejudicial comments by the prosecutor were permitted to be made and to stand despite objection.

(7) The court refused to charge the jury on matters which were clearly in accordance with the law and formed the basis of the defense, to wit, the complete knowledge of the alleged victims and the lack of concealment on the part of petitioner.

(8) Prejudice was necessarily created by, in the words of Judge Clark, dissenting, "different treatment of defense and prosecution counsel" (p. 1677).

The trial court completely failed to exercise its historic judicial function—to protect the accused by according him a fair trial on the charge of which he stood accused.

CONCLUSION

It is respectfully submitted that for all of the foregoing reasons, and particularly because of the important Federal constitutional questions involved and herein presented, the petition for certiorari should be allowed.

Respectfully submitted,

JAMES MARSHALL,
Attorney for Petitioner.

Of Counsel:

SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

APPENDIX

Section 338, Title 18, U. S. Code

338. (Criminal Code, Section 215.) Using Mails to Promote Frauds; Counterfeit Money. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. §5480; Mar. 2, 1889, c. 393, §1, 25 Stat. 873; Mar. 4, 1909, c. 321, §215, 35 Stat. 1130.)

N. Y. Civil Practice Act Sec. 789:

Privilege of a debtor, party or witness upon examination.

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * * But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination. (Added by L. 1935, ch. 630, in effect Sept. 1, from former §791.)

As amended by L. 1938 ch. 108, in effect March 14, the above section reads as follows:

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud * * * but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding, except on a charge or indictment for perjury committed in an examination under this article.

FILE COPY

FILED
SEP 28 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 493

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JAMES MARSHALL,
Attorney for Petitioner.

Of Counsel:
SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

Dated, New York, September, 1943.

APPEAL PRINTING CO., INC., 120 CEDAR ST., NEW YORK, WO 2-2245

INDEX

	PAGE
STATEMENT	1
THE FACTS	3
ESSEX HOUSE TRANSACTION	9
REYNOLDS TRANSACTION	11
APPRAISAL OF THE EVIDENCE	13
ARGUMENT (1)—The Government has failed to justify its contention that petitioner's constitutional right against self-incrimination has not been violated (Replying to Government's Argument 1, 1a and 1b)	15
Government's Theory	16
Supp. Pro. Testimony Subsequent to March, 1938	17
Supp. Pro. Testimony Prior to March, 1938	22
The Supp. Pro. Examinations Were "Testimonial"	25
ARGUMENT (2)—The deprivation of petitioner's right to cross-examine Stout & Co. was reversible error (Replying to Government's Argument 2a)	29
ARGUMENT (3)—The Government has failed to justify the admission of the Emanuel transaction (Replying to Government's Argument 2b)	34
CONCLUSION	37
APPENDIX	38

Table of Cases Cited

PAGE

Bogk *v.* Gassert, 149 U. S. 17 (1893) 33
Brown *v.* United States, 79 Fed. (2nd) 321 (C.C.A. 2nd 1935) 32
Dunham *v.* Ottinger, 243 N. Y. 423 (1926) 21, 23
Ensign *v.* Pennsylvania, 227 U. S. 592 (1913) 26
Jack *v.* Kansas, 199 U. S. 372 (1905) 21, 23, 25
Johnson *v.* U. S., 228 U. S. 457, 8 26
Kettenbach *v.* U. S., 202 Federal 377 (C.C.A. 9th 1913), cert. den. 229 U. S. 613 ..... 36, 37
Rice *v.* United States, 35 F. (2d) 689 (C.C.A. 2nd 1929) 33
United States *v.* Monia, 317 U. S. 424 (1943) 21
United States *v.* Mulligan, 268 Fed. 893 (1920) 28
United States *v.* Sullivan, 274 U. S. 257 (1927) 28
United States *v.* Weisman, 111 Fed. 2nd 260 (C.C.A. 2nd 1940) 22
Wilson *v.* United States, 162 U. S. 613 (1896) 24, 25

Statutes and Authorities Cited

Civil Practice Act:
Sec. 789 ..... 16, 21
Secs. 773-792 23
New York Consolidated Laws (Cahill), c. 41, Secs. 921, 925, 932, 938 21
New York Penal Law, Sec. 1292a 21
United States Constitution, Fifth Amendment 15, 17, 19, 22, 23, 24, 25, 26
Wigmore on Evidence (Vol. 8):
3rd Edition, Sec. 2259c 27
3rd Edition, Sec. 2260 21
3rd Edition, Sec. 2264 26
3rd Edition, Sec. 2276 ..... 19, 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Statement

The Government's brief in opposition contains a rather lengthy alleged summary of the evidence developed at the trial and it justifies such departure from the issues of this proceeding by stating that the alleged summary is necessary in order to appraise the petitioner's contentions of error "in the light of the clear and convincing proof of his guilt."* Thus, the Government at the very outset indicates its intention to rely on the alleged over-

*See footnote, page 12 of brief in opposition.

whelming nature of the evidence and in effect, maintains that the necessity for a fair trial recedes as the evidence of guilt increases.

The petition and supporting brief, confining itself solely to the issues of law presented in this proceeding, did not treat of the facts of the case at any length (p. 2 Petition for Writ of Certiorari). It was assumed that the Government would try to show to this Court that the "extreme care needed to insure a fair trial" referred to by Judge Clark in his dissent in the Circuit Court below, had in fact been exercised.

As one reads the statement of facts which the Government presents as an alleged summary of the evidence, one is led to wonder how any judge of any Circuit Court of Appeals could possibly, after some eighteen weeks of study of the record, have stated:*

> "I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial."

and again:

> ". . . I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail."

The record shows that the Government has not presented a full and fair statement of facts from which this Court can justly appraise the petitioner's contention of multiple prejudicial errors. Even assuming *arguendo*, as does the Government, that this Court's decision on

* Minority opinion, pages 1675, 1677.

the numerous and repeated rulings will, in part, depend on the status of the evidence, it is manifest that the facts have not been presented to this Court in the Government's brief in opposition.

The Facts

The petitioner had been a commission agent for many years (p. 1580). For a time he had been connected with the fur business and later with various Stock Exchange houses. He secured customers for furs and received a commission. His services and favor were also sought after by stock brokerage firms, by reason of his connections with moneyed interests. These stock brokerage firms were most anxious to secure the lucrative business which petitioner controlled (pp. 728-9, 738, 746, 930-2).

At the trial the Government's testimony consisted largely of an attempt to prove the defrauding of one of those New York Stock Exchange firms, Stout & Co.,* whose partners were Messrs. Arthur Goetz and W. Hutton Miller.** These men, through their firm, had cashed for the defendant numerous checks drawn on the J. Feldman account at Petoskey, Michigan (p. 746). In most instances the funds to cover the checks issued were obtained by the cashing of other checks with the same firm and wiring that money forward to Petoskey, Michigan, for deposit. Petitioner was known to be a large business getter (p. 728). He had secured for the firm of Munds, Winslow & Potter, a prominent Stock Exchange firm,

* Stout & Co. was named as a victim and as part of the alleged scheme to defraud in the bill of particulars furnished by the Government to petitioner prior to trial (p. 14z). Any contention that Stout & Co. is not a part and a main part of the alleged scheme to defraud should be viewed in the light of this state of the record.

** Referred to hereafter as Hutton Miller.

commissions as high as $150,000 in a period of some fifteen months (p. 1309). This was during the year preceding his association with Stout & Co., and Stout & Co. was well aware of his business getting history and possibilities (pp. 746, 930-2, 949). Among some of petitioner's accounts were those of Fred and Larry Fisher, millionaire financiers and executives of General Motors (pp. 931, 1307-8).

One of the services to be rendered by Stout & Co. in return for petitioner obtaining business was the cashing of the checks in question and the advancing of money to him (pp. 740, 747, 749, 842). Direct payment of commissions would have been a violation of Stock Exchange rules (pp. 741, 1387). Petitioner was unable to become a customer's man and receive commissions directly, in accordance with the rules, because he had judgments outstanding against him and the necessary approval of the Stock Exchange was unlikely under those circumstances. Petitioner freely disclosed this situation to Stout & Co. (pp. 841-2). This was also the reason why he did not have his own bank account but used his father's account. This, too, was disclosed to Stout & Co. (p. 842).

It had been the practice of Stock Exchange firms to take temporary quarters in Florida during the winter season for the purpose of transacting business mainly with a view to making contacts which would remain permanently, and for the purpose of cementing relationships with old customers (pp. 1310-11). Petitioner had been active on behalf of Munds, Winslow & Potter, a New York Stock Exchange firm, during the winter season of 1937-1938 in Florida. After discussions between petitioner and the partners of Stout & Co. in the fall of 1938, it was decided that he would fulfill a similar function for

Stout & Co. during the winter season of 1938-1939 (pp. 949-951).

At Stout & Co.'s request, petitioner arranged for stock brokerage facilities at Miami Beach, consisting of three separate apartments on the boardwalk (p. 952). One was used as the main brokerage office of Stout & Co.; another, adjoining, but with a separate entrance, was used as petitioner's private apartment and as an exclusive suite for certain selected, important customers who did not wish to transact their business in the main office (pp. 938, 1432-1438). In these private quarters Stout & Co. installed a Translux (a modern projectionlike ticker tape arrangement) (pp. 787, 935). There was an inter-connecting telephone system direct to the main office next door for placing orders and obtaining market reports. Meals were prepared by a cook engaged by Stout & Co. and served to these special customers (pp. 955, 1436). Petitioner was supplied with a car and chauffeur by Stout & Co., in addition to his room and board (pp. 955, 1436, 1439). The third apartment was above the offices and was occupied by Hutton Miller and his wife during the winter season (p. 1433). Hutton Miller served as resident-partner of Stout & Co. in Florida for the winter season and petitioner's activities were carried on under his direction.

When the petitioner first became connected with Stout & Co. in New York (prior to the Florida season), his business was handled through a branch office at the Hotel Pierre (p. 747). A bank account was maintained by Stout & Co. at the Bank of New York, which was near the Pierre Hotel, mainly for the accommodation of petitioner in the cashing of his checks (pp. 740, 928). After a time, petitioner's business was transferred to the main office where it was handled directly by the partners, Messrs. Goetz and

Miller (pp. 748, 784). Around November of 1938, the advances of Stout & Co. to petitioner through the cashing of checks had reached the amount of some $12,000. Stout & Co. then paid petitioner $12,000 so that the outstanding checks could be cleared (pp. 784-5).

The check cashing accommodation continued after that payment (p. 785). By the end of December, the amount advanced to petitioner had again reached a substantial sum (p. 786). Petitioner at that time went to Miami Beach to participate in Stout & Co.'s winter business season (p. 785). He left in the possession of Arthur Goetz, the senior partner of Stout & Co., a batch of checks signed by J. Feldman, payable to the order of Sam Feldman, and endorsed by him. The amounts and the dates on the checks were blank. Goetz then from time to time, in New York, in petitioner's absence, filled in the amounts and the dates, cashed the checks and wired the money forward to Petoskey, Michigan, for deposit to cover checks petitioner had previously issued, which had not yet cleared. For a period, Goetz wired forward almost every day the sum of $6,000, after having first filled in and cashed Feldman checks in that amount (pp. 795-9). Stout & Co. advanced the Western Union charges for the wiring forward of the cash.

After petitioner had been in Florida for some time, Stout & Co. wired sufficient funds to him in Miami to take care of the checks cashed in New York, which were en route to Michigan (p. 785). Petitioner wired this money from Florida to Michigan and further check cashing was then handled directly by petitioner and the Stout partner, Hutton Miller at Miami (pp. 795, 785). The advances during petitioner's association with Stout & Co. had reached $36,000 by this time (p. 794). Inasmuch as peti-

tioner could have no official connection with Stout & Co., it was arranged that he should give Stout & Co. a note for $36,000, payable to Royal Miller, the father of Hutton Miller, who actually had had nothing to do with the transaction and had no connection with Stout & Co. (p. 969). Obviously the matter was handled in this manner so that the firm's name would be kept out of it.

During the winter season, while petitioner was in Florida, the practice had been for petitioner to give the checks to Dornbach, the chauffeur (pp. 1446-7), who would take them to the resident partner Hutton Miller for the Stout & Co. endorsement. Dornbach would then cash the checks at the Miami Beach Bank where Stout & Co. had its account (pp. 1441-3). At times the entire proceeds of the checks would be wired forward to Petoskey, Michigan, and at other times part would be wired and the balance returned to petitioner in cash.

Hutton Miller was fully aware of the exact nature and purpose of the check cashing (pp. 1421-3).

After petitioner returned to New York, a few days before the Stout & Co. office closed for the season, there was a substantial amount of checks outstanding en route to Michigan which had to be covered. Petitioner left checks signed in blank with the Stout & Co. Miami office for this purpose (pp. 1445-6). The resident partner, Miller, and the manager, Landau, filled in the amounts and wired the money forward to Michigan in petitioner's absence (pp. 1440-45).

On one occasion, because of the large amount involved, the Miami Bank refused to cash petitioner's check; but then agreed to cash it, if it were split up into two smaller checks equalling the same amount. Miller and Landau arranged it that way (pp. 1444-5).

Goetz, the partner who remained in New York, later used threats to force Miller to personally assume the resultant loss so that the Stock Exchange would not become aware of what the firm had done (pp. 924-5). Despite this precaution, the fact is that subsequently an investigation was conducted by a committee of the Stock Exchange (pp. 934-5). During the course of this investigation, it was found that petitioner enjoyed many unusual services from Stout & Co. including the check cashing privileges. Both Goetz and Miller were severely censured. The language used by the committee is direct refutation of the Government's theory, viz., that Stout & Co. was a victim (958), and the committee, saying that more serious action, such as suspension, was not being taken because the public had not been hurt in any way, added:

> "The Committee wishes to make it very clear to you, Mr. Miller, that they consider the practice that you allowed to go on in your office to be, to say the least, most reprehensible. This is the sort of practice that we will not tolerate and we mean to stop it" (pp. 957-8).

From the testimony of the Government's own witnesses at the trial, therefore, it must be apparent that the check cashing activities were part of a business arrangement between Stout & Co. and petitioner. Stout & Co.'s full knowledge and awareness, as well as active, knowing participation in the transactions for their own business ends, removes from these transactions any semblance of fraud as to them—the alleged victims.

Essex House Transaction

The rest of the Government's case to prove an a. ed scheme to defraud consisted of another incident c mencing in January, 1937 and ending in August, 193. This transaction bore no relationship to the Stout & Co. matter, and in fact occurred well over a year prior thereto.

In the Essex House situation, the Government's statement of facts would convey the impression that petitioner, a stranger, sauntered up to the desk of the hotel, cashed a large check and then continued to almost daily cash his checks there so that over a period of a few months he received some $800,000 thereby. It is apparent that the underlying basis of the dealings and transactions between the petitioner and Essex House has been omitted from the Government's statement. Petitioner, in 1937, was a tenant at the Essex House (p. 520). Moreover, it is obvious that neither the defendant nor any other guest could have cashed $800,000 in checks at the hotel over a period of months if the relationship existing between the hotel and the defendant were merely that of innkeeper and guest.

The cashing of the checks was done with the consent of the credit manager of the hotel, who was not charged in any way with being an accomplice; he was entirely familiar with the defendant's practice of wiring money forward to cover checks previously cashed (pp. 459-460). Feldman had done business favors for the Essex House and was, in fact, personally friendly with and had made check cashing arrangements with its operating trustee (pp. 536-537). The management at the time of the check cashing was fully aware of petitioner's poor financial condition (pp. 626-8, 632-3). The top ranking officials of the Essex

House were not unaware of the purpose for which the checks were being cashed by petitioner (pp. 508, 556-7). The credit manager knew that the money was being wired forward to cover other checks previously cashed by the hotel* (p. 460). Even Western Union knew that the checks were being cashed to provide funds to cover previously cashed checks (p. 377). The Government's witness Erb (alleged to be a victim) himself wired forward money for the cashing of these checks and signed the defendant's name to the money orders (p. 401). Most significant is the fact that the impressed fund maintained by the Essex House for the purpose of cashing checks of guests was $7,000 higher than generally required for its normal purpose—this, in order to accommodate the defendant (pp. 1281-2).

In view of that situation, which the Government has not disclosed to this Court in its statement of facts, it is not surprising that Judge Clark, in his dissent below, stated that the affirmative evidence of knowledge of the alleged victims was strong and further said:

> "Certainly agents of the Essex House had it (knowledge) and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the sizeable amounts of these daily transactions" (pp. 1675-6). (Matter in parentheses ours.)

At page 10 of the Government's brief, it is made to appear that the "discovery" by the Essex House of the defendant's check kiting activities occurred in August of 1937 and that they then stopped the further cashing of

*The Government has evidently overlooked this part of the record when it stated, at page 9 of its brief, that Little, the credit manager, was unaware of the alleged "kiting."

checks. This is misleading, for the record clearly indicates that both before and throughout the entire period of time that the Essex House was cashing the defendant's checks, it was also the holder of an unsatisfied and uncollected judgment against the defendant for room rent and services and that it had been unsuccessful in its attempt to collect from the defendant even that small judgment (pp. 626-640). The Essex House then was cashing daily huge checks for the defendant with full knowledge that he was without funds (p. 639). The fact is that the Essex House refused to continue the accommodation of check cashing to the defendant only after there had been a change in ownership and management (p. 492). At that time the defendant was requested to take care of the outstanding checks, which he did, and the Essex House did not incur any loss in these transactions (p. 500).

In brief, the record is replete with testimony adduced by the *Government itself* that there was not the slightest effort by the defendant to conceal his intent and purpose from any one connected with Essex House. Moreover, the Government's evidence affirmatively shows that Essex House, its credit manager, its operating trustee and everybody in authority there involved not only knew that the checks which were cashed daily did not have supporting funds behind them, but they themselves willingly and knowingly participated in aiding the "kite" by cashing additional checks and wiring forward moneys to meet checks they previously had cashed.

Reynolds Transaction

At the trial, the Government tried to establish an alleged fraud in the borrowing of $32,000 from one Edwin S. Reynolds, Jr. in 1937 for which Feldman gave Reynolds

notes in this sum (Exhibits 86 and N; pp. 1580-1, 1624-5). The Government's position apparently is that there was fraud involved inasmuch as Reynolds had sent petitioner checks in blank drawn on Reynolds' bank account and petitioner had filled in the amounts and cashed the checks. Reynolds was named as a victim and was not in any way indicated to be an accomplice (pp. 10-14; 14Z). Feldman had cashed these checks with Reynolds' knowledge and consent (pp. 1318-20). Feldman believed Reynolds, the president of a prominent mid-western corporation, to be a wealthy man who dabbled in the market as a diversion and lived in luxurious fashion (pp. 597, 1315-1316).

The return of the Reynolds checks for lack of funds came as a surprise to Feldman. In fact, before Reynolds' checks were cashed for Feldman by Munds, Winslow & Potter, Mr. Allen, the managing partner of this prominent firm, communicated with Reynolds at Dayton, Ohio (pp. 1318-20). Reynolds was informed of the amount of the check and was told that petitioner was going to be given the cash (pp. 1318-20). The transaction was not completed until Reynolds said it was all right to go ahead (p. 1319). Feldman gave two promissory notes to cover the money advanced by Reynolds (Govts. Exhibit 86, Defendant's Exhibit N). One note for $12,000 was subsequently paid by Feldman who received the note back (pp. 1410-1). Some payments were made by Feldman on the other note (pp. 1414-6). Although petitioner was alleged to have defrauded Reynolds, the proof showed that Feldman and Reynolds remained warm friends to the time of Reynolds' death and Feldman was regarded as one of Reynolds' closest intimates (pp. 1414, 1416-7). Reynolds himself, as opposed to the Government's conten-

tion of fraud, had stated on occasion that the entire transaction was a loan (p. 1414).

With respect to the Reynolds transaction, Judge Clark stated:

> "As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in and Reynolds naively complied. What would he have signed the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps, here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important" (p. 1676).

The record is abundantly clear that the Reynolds transaction involved no fraud of any kind. It was merely the case of a friend advancing or attempting to advance some money to help out a friend. That this attempt to help created some hardship for the volunteer did not make the defendant's conduct fraudulent.

Appraisal of the Evidence

It thus appears that in the Stout & Co. and Essex House transactions, around which the Government's case is built, there was present the element of complete knowledge and awareness on the part of all parties concerned. By knowledge, we mean knowledge that the very checks that the parties were cashing for the defendant were at that time without funds behind them; knowledge that previously issued checks were being paid through the cashing of additional ones; knowledge that, unless the parties

would cash additional checks, the earlier ones could not be paid. In short, such knowledge as made each of the alleged victims a willing participant with the defendant in the transactions.

While the Government produced evidence of check kiting conducted and participated in by the petitioner and the so-called victims, this very evidence likewise established that the kiting *was not fraudulent* as to the alleged vistims. The evidence is unmistakably clear that the parties were either knowingly accommodating the petitioner (as in the Essex House and Reynolds situation) or that (as in the Stout & Co. case) there was a financial business arrangement involving the planned cashing of these checks as compensation to the petitioner for services being rendered.* Clearly, under these circumstances, the reference in the footnote at page 12 of the Government's brief as to the "clear and convincing" proof of the defendant's guilt can hardly be said to be a fair appraisal of the evidence and the dissenting judge's opinion below, wherein he states that the guilt of the defendant was "doubtful", must be given real consideration in weighing the prejudice resulting from the multiple erroneous rulings of the trial court.

* It is noteworthy that nowhere in the record does it appear that the petitioner was to receive any other thing of substantial value from Stout & Co. for his extensive services.

ARGUMENT (1)

The Government has failed to justify its contention that petitioner's constitutional right against self-incrimination has not been violated.

(Replying to Government's Argument 1, 1a and 1b)

In that part of the brief in opposition which deals with the violation of petitioner's constitutional right against self-incrimination by the admission into evidence in the Federal Trial Court below of his testimony in supplementary proceedings in the Supreme Court of the State of New York, taken on some ten occasions over a period of four years in four independent actions, the Government, while relying on the decision of the majority of the Circuit Court below that the evidence was admissible, has completely jettisoned the reasoning therefor of both that Circuit Court and of the United States Attorney.* Furthermore, the Solicitor General in a last minute effort to avoid review by this Court, takes the position that the result achieved by the majority below was in accord with the well established and controlling law and that the violation of the Fifth Amendment is not squarely raised in the case at bar and that therefore there is no reason for this Court to grant a writ to review.

Recourse to the actual opinions of both the majority and the minority in the Circuit Court below shows that there is no well established or controlling law with respect to the problem herein raised.

---

*It is interesting to note that even the majority in the Circuit Court below were unconvinced by the arguments advanced by the United States Attorney there and attempted to support the admissibility of this testimony on a theory evolved subsequent to the argument. In this Court the Solicitor General has abandoned all previous reasoning.

"No controlling authority has been cited for this proposition . . . . We are not convinced that this decision should control determination of the case at bar (referring to Clark *v.* State, 68 Fla. 433) . . . . It seems surprising that neither the researches of counsel nor those of this Court have uncovered any precise authority . . . ." (Majority Opinion)

"The question of use in the federal courts of defendant's examination in the state supplementary proceedings, absolutely privileged on a state prosecution, is, as the opinion shows, not settled." (Minority Opinion)

The foregoing quotations from the opinions of the Court below show quite clearly that the case at bar squarely raises the question of the violation of the petitioner's constitutional rights in a situation where the law is unsettled and where no precise authority exists. It would be difficult to find a case where a Circuit Court's opinion has more markedly (albeit impliedly) suggested that the constitutional issues herein involved should be passed upon and be finally adjudicated by this, the highest Court in the land.

Government's Theory

The brief in opposition divides the Government's argument as to the violation of the Fifth Amendment into two parts, one dealing with the supplementary proceedings testimony taken prior to March, 1938 and the other dealing with the supplementary proceedings testimony taken subsequent thereto.*

* An amendment to the immunity portion of the New York State Supplementary Proceedings Statute (Civil Practice Act, Section 789) became effective on March 14, 1938.

SUPP. PRO. TESTIMONY SUBSEQUENT TO MARCH, 1938

The Solicitor General argues that the testimony in the five supplementary proceedings examinations taken subsequent to March, 1938* were properly admitted at the trial (over objection and exception) because (a) that testimony was merely cumulative of testimony taken in the earlier supplementary proceedings and therefore was not prejudicial; (b) the petitioner must be charged with having waived his privilege against self-incrimination under the Fifth Amendment by reason of his testimony in the other and earlier supplementary proceedings examinations; and (c) such testimony was in any event admissible because, on its face, it did not include *all* the elements of the crime and was, therefore, not *per se* incriminating. The record alone disproves the first contention; the law invalidates the second; both the record and the law defeat the third.

The record shows that a vital part of the prosecutor's case at the trial consisted of proof that during 1938-1939 the petitioner allegedly "kited" many hundreds of thousands of dollars in checks by cashing them with Stout & Co., as a result of which it was claimed this company was defrauded of $81,000.**

The transactions with Stout & Co. did not commence until the fall of 1938 and the proof covered a period of time beginning in the fall of 1938 and ending in the

* Pages 1588, 1591, 1597, 1604, 1616.

** Whether Stout & Co. (a partnership) was a part of the scheme to defraud, as indicated by the indictment as amplified by the bill of particulars wherein it was named as a victim (p. 14z) or whether the transactions with Stout & Co. were in the nature of similar acts, as the Government now contends, is unimportant at this point because, in any event, no one reading the record can gainsay that the evidence presented as to Stout & Co., and the Judge's charge in connection therewith, made it a vital part of the proof presented to the jury for the purpose of convincing it that the defendant should be convicted of the crime charge in the indictment.

spring of 1939 (pp. 714-715, 852-855). The supplementary proceedings testimony taken prior to March, 1938 concerned the defendant's situation and conduct during and prior to 1936-1937* and obviously could not concern or relate to his situation or conduct with respect to 1938-1939, at which time he was involved with Stout & Co.

To establish the crime charged against the defendant as to Stout & Co., the Government attempted to—indeed had to—prove a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as prove the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn. Proof of all of these elements was necessary in order to sustain this phase of the Governments' case and a failure of proof as to any one of them would be fatal to the prosecution's position. The record discloses that essential evidence as to the petitioner's relations with Stout & Co., of his check "kiting" activities with them and of his inability and lack of power to pay the checks theretofore cashed with Stout & Co., was supplied by the defendant's compulsory testimony in supplementary proceedings taken subsequent to March, 1938.** It is patent on the face of this record that the 1938-1939 supplementary proceedings testimony concerning and relating to Stout & Co. could not be and were not cumulative of the supplementary proceedings testimony taken in 1936-1937, during which period the petitioner was active in connection with the Essex House and Reynolds transactions, and which latter period was well over a year prior to the inception of the Stout

* This was the period of time during which the defendant had transactions with Essex House and Reynolds.

** See Appendix hereto, pp. 39-44; to facilitate analysis we have appended therein illustrative portions of the supp. pro. testimony subsequent to March, 1938.

& Co. transactions and had no relation to them. Therefore the Government's contention that the violation of petitioner's rights under the Fifth Amendment should be overlooked by reason of the cumulative quality of the evidence admitted, must fail.

The Government also attempts to make use of the alleged cumulative quality of the supplementary proceedings examinations subsequent to March, 1938 by arguing that the petitioner waived his constitutional privilege under the Fifth Amendment with respect to that admittedly compulsory testimony* by reason of his having testified in certain supplementary proceedings in 1936-1937.

With respect to the 1938-1939 testimony, not only did it concern, as above indicated, transactions and conduct covering a different period of time from those treated in 1936-1937 examinations, but four out of the five examinations in 1938-1939 had been conducted pursuant to a civil judgment against the defendant in a case (*Moyer* v. *Feldman*)** entirely separate from and unconnected with the civil cases, *Hearst Hotels Corp.* v. *Feldman, Corwend Corp.* v. *Feldman, 58-59 Realty Corp.* v. *Feldman,*** pursuant to which the defendant had been examined in 1936 and 1937.

The government relies on Sec. 2276 of Vol. 8 of Wigmore's Treatise on *Evidence* (3rd Ed. 1940), for authority to the effect that there was a waiver of the constitutional privilege against self-incrimination as to the 1938-1939 testimony by reason of the 1936-1937 testi-

* As to this testimony, the Government concedes that the immunity statute of the State of New York was valid and complete after March, 1938, and that thereafter the defendant, as a subpoenaed party, had no choice but to comply with the subpoena and to answer the questions propounded.

** Pages 1597, 1604, 1591, 1588.

*** Pages 1613, 1133-1136, 1622, 1289, 1620, 1621, 1627, 1628, 1142-1147, 1578.

mony.* That section can give little comfort to the Government's position in view of the fact that, as shown above, the testimony was taken in different proceedings, related to transactions at other and different times, and was admitted in the trial court as evidence of fraud in the Stout & Co. transactions, whereas the 1936 and 1937 testimony referred to the defendant's transactions and conduct as bearing upon Essex House and Reynolds as alleged victims. Applying the test set forth in Wigmore's[2] treatise,** it is apparent that there was no waiver in the case at bar. If the Government's theory be correct, then once a debtor has testified in supplementary proceedings without raising his privilege against self-incrimination (assuming that such privilege existed at the time), he has forever debarred himself from raising that constitutional privilege in subsequent examinations in different proceedings, even though the subsequent and different examinations relate to other facts, situations and crimes. The fallacy of this theory is apparent on its face. If there had been a waiver it could operate only as to the transactions which the earlier testimony directly concerned and it could not operate *in futuro* as to different facts, different situations and different alleged illegal acts.

The final argument of the Government as to the compulsory supplementary proceedings testimony taken subsequent to March, 1938 is that these examinations did not clearly on their face contain *all* of the elements of a

* See footnote at page 15 of government's brief.

** In order to have a waiver operate, not only must the later and other examinations refer and relate to the same transactions and alleged illegal acts but the waiver "is limited to the *particular proceeding* (italics ours) in which he thus volunteers testimony." 8 Wigmore on *Evidence* (3rd Ed. 1940) Section 2276, pages 450-451. In the case at bar there were, as seen above, four different particular proceedings.

crime and, therefore, not being *per se* wholly incriminating, the defendant could not receive the protection of the immunity statute of the State of New York.*

The elements of the mail fraud scheme charged in the case at bar consisted of proof that the defendant had cashed checks with the alleged victims, 1) at a time when he had insufficient funds in the bank to clear those checks, 2) when he was without the means or resources to meet them, and 3) that he cashed additional later checks to provide the funds to meet the earlier ones. It is obvious from the excerpts of the 1938-1939 supplementary proceedings set forth in the Appendix hereto that those supplementary proceedings examinations were greatly prejudicial to the petitioner, highly relevant and most important to the prosecution's charge of a federal crime and, needless to say, were most incriminating. That same testimony was also most incriminating under various criminal statutes of the State of New York.**

That this type of testimony receives the protection of the constitutional privilege and accordingly of the immunity statute admits of no doubt. It is not necessary that each piece of testimony prove the entire crime.*** Moreover, the privilege against self-incrimination is not confined only to those instances where at least one of the

---

*A person receives the protection of the New York State immunity statute by testifying in conformity with it and does not have to refuse to answer first to secure its protection. Section 789 C. P. A.; cf. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926) and *United States* v. *Monia*, 317 U. S. 424 (1943). Of course, it is clear that in any event a person testifying in the courts of the State of New York, is unable to claim a privilege as to incrimination under the federal law. (*Jack* v. *Kansas*, 199 U. S. 372 (1905)).

**See New York Consolidated Laws (Cahill), c. 41, Sections 921, 925, 932, 938, and New York Penal Law, Sec. 1292a.

***"Most criminal acts are made up of two or more subordinate facts, each essential to the completed crime . . . In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order ot establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole." 8 Wigmore, *Evidence* (3rd Ed. 1940) Section 2260.

definite elements of a crime is the subject of the testimony. As was said by Learned Hand, J., in *United States* v. *Weisman*, 111 Fed. 2nd 260 (C. C. A. 2nd 1940) at page 262:

> "All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached . . . ."

A fortiori, in the case at bar, where the supplementary proceedings testimony of 1938 and 1939 supplied *several* of the vital elements of the crime in the Stout & Company matter under federal law, as well as under state law, there can be no doubt as to the incriminatory nature of the testimony. Accordingly, this portion of the Government's claimed justification falls of its own weight.

The prosecution has therefore signally failed to prove that no violation of the Fifth Amendment occurred by reason of the admission of the supplementary proceedings subsequent to March, 1938. The admission into evidence of those five prejudicial supplementary proceedings examinations must, standing alone, result in a reversal of this conviction.

Supp. Pro. Testimony Prior to March, 1938

Even as to the supplementary proceedings testimony taken prior to March, 1938 and admitted into evidence in the District Court below over petitioner's objections, it is well settled law that at the time he gave that testimony pursuant to subpoena in the State court, the petitioner could not raise a privilege against self-incrimina-

tion under the Fifth Amendment in that his testimony might incriminate him under the federal law. *Dunham* v. *Ottinger, supra.* It can hardly be argued that there was a waiver of that privilege by the petitioner at the time he testified in the state court, in view of the fact that he had no federal privilege at that time, and the mere raising of it would have been a futile gesture. Equally invalid is any contention that if the petitioner might have raised a state privilege (under the then form of state immunity statute) as to the 1936-1937 testimony and failed to do so, he thereby waived a federal privilege which he did not at that time have.

The 1936-1937 supplementary proceedings examinations were taken pursuant to the laws of the State of New York and particularly the supplementary proceedings statutes (Article 45, Sections 773-792, New York Civil Practice Act). The attendance of petitioner at those examinations was compulsory. He was required to answer the questions put to him and he was forced to give answers even though those answers might incriminate him under a federal statute. *Jack* v. *Kansas* (*supra*).

In its brief in opposition, the Government has interjected the question of the validity of that portion of the supplementary proceedings statute which refers specifically to the immunity given in the State of New York. That immunity statute, valid or invalid, could, of course, give no immunity in the federal court. Any protection that the defendant might have against incrimination under the federal law would arise out of his rights under the Fifth Amendment; and under *Jack* v. *Kansas* (*supra*) that right did not exist and could not be raised in the state court. Accordingly, the first time that the petitioner could avail himself of the protection of the Fifth Amend-

ment was when the testimony was offered against him in the trial court below, and at that time he did seek that protection in no uncertain terms.

Whatever the effect of the validity or the partial validity of the New York State immunity statute (or for that matter the entire absence of any immunity statute) might have on the privilege of the defendant to refuse to answer questions in supplementary proceedings, the answers to which might incriminate him under a New York State law, that question is entirely irrelevant here. The sole issue in the case at bar, even as to the 1936-1937 testimony, is whether petitioner, who had theretofore been subpoenaed under the laws of New York State and had pursuant thereto given testimony under oath which incriminated him under the federal law (and at the time of testifying he had no privilege to refuse to answer on the ground of incrimination under the federal law) is unable nevertheless to avail himself of the protection of the Fifth Amendment when that testimony is subsequently offered against him in the federal court. The problem is simply one of whether, as the minority analyzed it in the court below, a person is to be trapped between the "interstices" of overlapping state and federal sovereignties.

The government, in an effort to circumvent the basic issues here at stake, has attempted to bring the situation here within the doctrine of *Wilson* v. *United States*, 162 U. S. 613 (1896).*

The *Wilson* case was one where the defendant had given a voluntary statement, not under oath, to the United States Commissioner, and that statement was subsequently used in his trial in the United States court. At the time that the statement was given, the petitioner there

* See brief in opposition at page 17.

could have raised his constitutional privilege under the Fifth Amendment, but failed to do so. The statement itself was finally admitted in the federal court and there was no question of overlapping and different jurisdictions, nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, *waives* it. Indeed, on the precise facts of the *Wilson* case, it is one dealing with the voluntary nature of a confession rather than with a waiver under the Fifth Amendment.

Be that as it may, however, the *Wilson* decision is in no way determinative of the case at bar which involves the problem of overlapping jurisdictions. This Court, in *Jack* v. *Kansas, supra,* at page 382, said that it did not believe that the evidence obtained compulsorily in the state court would be used in the federal court, and the defendant was, therefore, directed to answer the questions in the state court. The case at bar presents the situation where that which this Court believed would never happen has, in fact, happened. Any contention that *Wilson* v. *United States, supra,* or cases of its type are determinative of the question in the case at bar, is patently unsound.

THE SUPP. PRO. EXAMINATIONS WERE "TESTIMONIAL"

The Government finally claims that the case at bar does not involve self-incrimination under the Fifth Amendment, because the supplementary proceedings testimony is not "testimonial" in nature. It is true that the protection of the Fifth Amendment extends to "testimonial" matters only, but by no stretch of the imagination can

the sworn testimony of the petitioner, pursuant to subpoena of a court of record of the State of New York be considered anything other than "testimony".

The Government relies upon the authority of a group of cases dealing with books, records and reports. Not one of the cases cited at page 23 of the Government's brief on this point involves the use of "testimony" in its legal or accepted sense. Not one of them pertains to the sworn examination of a person testifying in court pursuant to a subpoena or legal process. Wigmore's Treatise on Evidence, in analyzing the "testimonial" protection given by the Fifth Amendment, says:

> "The privilege protects a person from any disclosure *sought by legal process against him as a witness.*"*

Johnson v. *United States*, cited at page 22 of the brief in opposition, and the other cases there cited are readily distinguishable from the instant case, in that they fall within the rule that:

> ". . . documents . . . obtained from the person's control *without the use of process against him as a witness* are not in the scope of the privilege. . . ."**

In *Ensign* v. *Pennsylvania*, 227 U. S. 592 (1913), cited by the Government at pages 18-19 of its brief, this Court, in defining "testimony", stated quite clearly that examinations under the Bankruptcy Act (similar in nature to sup-

---

* 8 Wigmore (3rd Ed.), Section 2264, page 363.

** 8 Wigmore, *Evidence* (3rd Ed.), Section 2264, page 364. While it is not essential to petitioner's case, it is interesting to note that even as to books, records or chattels, there would be a violation of the Fifth Amendment if they were obtained from a defendant in response to a subpoena or other process treating him as a witness. Wigmore, same section.

plementary proceedings in a state court), were "testimony" (see p. 599). There this Court drew a sharp distinction between the examination of a debtor and his sworn bankruptcy schedules filed in court.

Does the Government seriously contend that had the testimony of the defendant in the supplementary proceedings been proven in the trial court below by the oral testimony of the attorney who had conducted the examinations or by the reading of the stenographic minutes thereof, the petitioner's rights would have been different? Does testimony become any less testimony because it has been transcribed on paper?

The Government finally seeks the assistance of precedents in cases involving statutory requirements that a person file reports with a public agency.* Their pertinence is allegedly justified by the lengthy quotation from Wigmore appearing in the same footnote. The very source of this quotation is the best refutation of its applicability to the instant case. That section (2259c) is entitled "Crime disclosed in (1) Public Books or (2) Books Required by Law to be Kept." The quoted excerpt is immediately preceded by this:

> "The same reasoning applies to records required by law to be kept by a citizen not being a public official, e.g. a druggist's report of liquor sales or a pawn broker's record of pledges. The only difference here is that the duty arises not from the person's general official status but from the *specific statute limited to a particular class of acts.*" (Italics ours.)

Obviously, then, by applying the analogy of the cited cases, the Government has attempted to remove the very

* See authorities cited in brief in opposition, page 23, footnote 30.

limitations on the application of the doctrine, so carefully fixed in the quoted section of Wigmore.

The effect of the attempted removal of the limits of the doctrine is best stated in *United States* v. *Mulligan*, 268 Fed. 893 (1920). Distinguishing between records or reports required as an incident to the privilege of engaging in enterprises regulated by statute, from testimony and private records, the Court there, at page 897, said:

> "The privilege and immunity of a citizen in his private affairs is carefully safeguarded and distinguished. . . . . Without such distinction of the rights of the individual in his private unregulated business from his status when engaged in business only by permission of the government and under government regulations, the safety of the nation might be in danger."

As a matter of fact, even as to reports required by governmental authority or agencies, such as income tax reports, it is doubtful whether a person could be required to set forth facts in such reports which would incriminate him (see *United States* v. *Sullivan*, 274 U. S. 257 (1927)).

In the case at bar, we are not dealing with books, records, chattels, reports or even documents. On the precise facts of the case at bar this Court's support of the Government's theory would establish the doctrine that a person's examination under oath, pursuant to subpoena of a court of record, is not "testimony". As well might it be said that the testimony of a defendant before a grand jury in violation of his constitutional rights against self-incrimination is, nevertheless, admissible against him at his trial, provided the minutes are transcribed and the typed document, rather than oral testimony concerning the same, is offered in evidence.

The Government's remaining argument that the compulsion, if any, in this case occurred in the state court, squarely raises the very issue which we ask this Court to rule upon, namely, whether testimony elicited from a person in a state court under the compulsion of legal process, which incriminates him federally, at a time when he is unable to raise his federal privilege, is admissible at his federal trial over his objection. It is respectfully submitted that this issue, involving basic civil rights under the Constitution, which has not heretofore been passed upon by this Court, and as to which the law in this country is at the very least, unsettled, should be settled by this Court.

ARGUMENT (2)

The deprivation of petitioner's right to cross-examine Stout & Co. was reversible error.

(Replying to Government's Argument 2a)

The dissenting judge in the Circuit Court below, referring to the testimony of Goetz and Miller, the Stout & Co. witnesses, stated:*

> "Hence cross-examination of these witnesses as to their prior statements, declarations and conduct was highly important and significant. Refusal to permit such examination was, therefore, clearly erroneous, as the opinion points out. In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal."

Despite this statement by an impartial judge who considered the record at great length, the Government, at

* Page 1676.

page 25 of its brief in opposition, attempts to disparage the effect and importance of the Stout & Co. testimony. While the Government emphasizes that no mailing was claimed in furtherance of the Stout & Co. transactions, it fails to mention the fact that Stout & Co. was specifically named as a victim in the bill of particulars and therefore was clearly designated by the Government to be a part of the specific scheme to defraud. Moreover, even if the Stout & Co. transactions were not part of the specific scheme, but were in the nature of a similar act, this alleged loss of $81,000, treated at length through some 288 pages of the record, involving the alleged kiting of many hundreds of thousands of dollars of checks, could hardly be said not to be a vital part of the evidence presented by the Government in an effort to secure a conviction of the crime charged.

What is even more interesting is the fact that the Government now abandons the considered judgment of both majority and minority below, admitting that the exclusion of the cross examination of Stout & Co. witnesses was error and contends here that the Circuit Court improvidently conceded such error. Evidently, the Government is not convinced that the error which occurred in the trial Court was without prejudice to the defendant and therefore it is forced to the position of trying to sustain the propriety of the exclusion of the cross examination, rather than to brush aside its effect and to argue that a wrong was done to this defendant but that he is without remedy.

Most of the rest of the Government's argument with respect to this matter is so palpably tenuous that it might well be disregarded. For instance, the Government draws attention to the fact that the trial Court gave the defendant some opportunity of cross examination on other mat-

ters. It is puzzling as well as surprising to find the Government thus contending, in effect, that since the defendant was not deprived of all cross examination on all issues, he should be satisfied with what he got, and be grateful for little favors.

The Government would have it appear that at some time a Government witness, on some unimportant occasion, may have said "There was no fraud" and that what defendant sought was merely an admission by the witness that he had previously made this remark or indulged in conduct indicating such an opinion. That simply is not so. Even a cursory reading of the portions of the record set forth in our petition and brief, as well as the comments made in both majority and minority opinions in the Circuit Court below, will disclose that the petitioner endeavored to ask a whole series of questions relating to the witnesses' prior statements, declarations and acts inconsistent with and contradictory to the substance of their direct testimony. These witnesses had been the main source of the Government's proof of a scheme to defraud Stout & Co., named in the bill of particulars as a victim. The length and importance of the Stout & Co. testimony is made readily apparent by reference to the detailed statement of facts appearing in this reply to the Government's brief in opposition.

The Government at this point in its brief (see pages 26, 27, brief in opposition), in effect, says:

> Inasmuch as proof of actual loss or defrauding is not necessary in order to establish a mail fraud scheme (citing Schauble *v.* United States and other cases), therefore any cross-examination relating to the loss or defrauding is immaterial.

Stated otherwise, although the Government had the right to produce any number of witnesses to prove loss and

the defrauding of each of them, the defendant had no right to cross-examine each one with a view to discrediting his specific direct testimony in that regard.

This contention is clearly untenable. The Government ignores the fact that throughout the three volumes of the record it did not overlook an opportunity to produce and stress testimony that hammered home to the jury the supposed *loss* sustained by the witnesses *and the fact that they were allegedly defrauded.* Even in the Government's brief in this Court, there are frequent statements to the effect that the proof was that Stout & Co., Essex House and Reynolds, the three alleged victims of the scheme, had actually been defrauded (see pp. 12 and 25, Government's brief in opposition). After the prosecution had saturated the record with alleged proof of loss and defrauding of victims, through the testimony of the alleged victims themselves, it would prevent an effort by the defendant to discredit these witnesses by showing that they themselves had previously, by their words, deeds and conduct, contradicted their testimony at the trial.

In its brief in opposition, the Government relies on cases which, in substance, hold that as a basic matter, the offense had been proven when there has been shown a scheme to defraud. With this proposition we have no quarrel. However, in the case at bar, as in most cases under the Mail Fraud Statute, the Government was permitted to prove alleged actual defrauding and actual resultant loss. This was in accordance with the practice of prosecutors under this type of statute (for example, see opinion L. Hand, J., in *Brown* v. *United States*, 79 Fed. (2nd) 321, 324 (C.C.A. 2nd 1935). Indeed, any attempt by a defendant to limit the Government to mere proof of a scheme to defraud and to prevent the Govern-

ment from proving the actual loss and defrauding, has always been strenuously resisted by the United States Attorneys and the Courts have sustained the prosecutors in that position (for example, see the Government's brief in the Circuit Court of Appeals for the Second Circuit, at pp. 57-9 in *Rice* v. *United States*, and the opinion of that case in 35 F. (2d) 689 (C.C.A. 2nd, 1929)). As a matter of law, in any case, whether it be mail fraud or any other charge, even if the direct testimony adduced by the Government of the Stout & Co. witnesses had been entirely immaterial and irrelevant in the first instance and accordingly inadmissible, nevertheless, since the Government had adduced such direct testimony, the defendant had the right to cross-examine with respect to it. (*Bogk* v. *Gassert*, 149 U. S. 17 (1893)).

The Government finally argues that the cross-examination would have served only to confuse and mislead the jury. We fail to see how the jury would be more confused by the cross-examination of these Government witnesses than it was as a result of their direct testimony on matters which the Government now admits were immaterial in the first instance.

In the light of this situation and the state of the record, it can hardly be asserted with any degree of validity, that the ruling of both the majority and the minority in the Circuit Court below that the restriction and prevention of this cross-examination was error, was "improvident".

ARGUMENT (3)

The Government has failed to justify the admission of the Emanuel transaction.

(Replying to Government's Argument 2b)

The Government has attempted to justify the admission of the testimony relating to Emanuel & Co. by claiming that these transactions were similar offenses to the one charged in the indictment. The essence of the charge stated in the indictment is a scheme to defraud by the "kiting" of checks and the use of the mails in furtherance thereof.

"Kiting", as defined by the Government's experts in the Trial Court below, consists of:

> "a scheme whereby checks are drawn against insufficient funds and the delay in clearing that check is taken advantage of by cashing a check within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (p. 1166).

There was no proof that "kiting" of any kind was involved in the Emanuel transaction. Clearly, therefore, it was not a similar transaction.

The Government's brief in opposition attempts by generalizations and omissions to give the impression that the Emanuel situation did involve "kiting". A consideration of the facts set forth in that brief leads to a conclusion opposite to that for which the Government contends. The Government refers to three drafts drawn by the defendant on one Heller. As to these drafts, the Government obviously infers that the defendant had been

"kiting" through Heller in the Emanuel transaction. In the first place, the record definitely shows that there was an interval of several months between each of the Heller drafts (p. 990). Thus, it was impossible to have used cash obtained from the second draft to pay the first. Besides, the first two of the three Heller drafts were in no way connected with or used in the Emanual transaction. Emanuel & Co.'s accountant, a Government witness, made a complete analysis of the defendant's account, and nowhere in this analysis (or in the rest of the record) can it be shown that these two drafts entered into the Emanuel transaction in any way (pp. 1059-1119). The third draft (the $50,000 one) was not a "kiting" transaction because its proceeds were not used to cover a previously cashed draft and because no subsequent worthless checks or drafts were cashed to pay it. The $50,000 draft was never met.

The Government finally relies on pages 1064-1080 of the record. This is an analysis of the defendant's account with Emanuel & Co. over a period of time. The most that can be said for this portion of the record is that it shows that at various times the defendant deposited for credit in his account with Emanuel & Co. various drafts some of which were good and some of which were bad, and from time to time he drew out various sums of money which had no relation in any way to drafts which had been previously deposited. Withdrawal of parts of a trader's equity from stock brokerage accounts is an established practice among traders and there was no semblance of irregularity connected therewith in the case at bar.

The history of the defendant's account, as shown by the record in the pages cited by the Government, is the best refutation of the Government's contention that this

was a similar transaction, *i.e.*, one involving "kiting". Nowhere in the Emanuel transaction does it appear that the defendant cashed checks or drafts which were worthless and wired or sent the cash forward to cover other worthless checks or drafts awaiting payment. A number of the drafts deposited by the defendant in the Emanuel account were returned dishonored, but the Government does not claim (nor does the record show) that these dishonored drafts "were made good" by check or draft "kiting" of any kind.

The only possible resemblance (not similarity) between the Emanuel transaction and the crime charged in the indictment is that in both situations instruments for the payment of money were involved. There, even the resemblance steps.

The quotation from *Kettenbach* v. *U. S.*, 202 Federal 377, 384 (CCA 9th, 1913) cert. den. 229 U. S. 613, cited at pages 28 and 29 of the brief in opposition, is incomplete and misleading. In the first place, it is not true that stock trading was the "only business that by his own admission petitioner ever had". The petitioner had for many years been a commission agent and was in the fur business (p. 1580). Obviously, therefore, the Government must fail in its attempt to bring this transaction within the quoted language of the *Kettenbach* case (*supra*) which refers to "similar transactions committed by the accused in the ordinary course of his business". In addition, the Government has failed to point out that the basis of the admission of the proffered testimony in the *Kettenbach* case was that "in all of which reports there was evidence of a uniform system of falsification as shown by the books of the bank, similar to the falsification of the reports which was charged in the indictment". *Kettenbach* v. *U. S.*, *supra*, at page 383.

In the case at bar even the Government does not claim that the Emanuel transaction presents a case of a *uniform* or *continuing system* of conduct; and the fact that some six or seven years before the alleged commission of the crime charged in the indictment a draft that the defendant gave was dishonored, in no way meets the test of admissibility set forth in the *Kettenbach* case cited by the Government.

While it is true that in a measure the application of the similar transaction rule rests in the sound discretion of the trial court, even the Government here does not contend that such discretion extends to the admission into evidence of a transaction both outdated (see majority and minority opinions in the Circuit Court below) and basically different and dissimilar.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JAMES MARSHALL,
Counsel for Petitioner.

Of Counsel:
SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

September, 1943.

APPENDIX*

We here set forth some selected questions and answers appearing in the supplementary proceedings testimony (after March 1938) concerning the period of the Stout & Co. transactions.

Testimony Concerning Relationship With Stout & Co.

(From examination in supplementary proceedings of July 20, 1939, page 1591, *et seq.* of record, Government's Exhibit 95):

Record Page

1591 Q. Where did you stay when you were in Florida? A. At El Mirasol Apartments.

1591 Q. Where? A. Miami Beach.

1591 Q. Did you keep an apartment there? A. I occupied a room.

* * *

1592 Q. Whose office was it? A. Stout & Co.

* * *

1592 Q. And who paid the rent for that room? A. It was given to me gratis.

1592 Q. By whom? A. By Stout & Co.

* * *

1592 Q. Who paid for your meals while you were in Florida? A. The firm paid all my expenses down there.

1592 Q. Which firm do you refer to? A. Stout & Co.

1592 Q. Were you employed by them? A. I was not.

1592 Q. Did you have any arrangement with them under which they paid for your room and board? A. I was there as a friend of Mr. Miller's.

1593 Q. Did you have any business transactions of any kind while you were in Florida from January first until you returned to New York City? A. None whatsoever.

---

* Referred to in footnote, page 18 of this brief.

Appendix

(At the trial, defendant's position was that he had had business transactions with Stout & Co. in Florida, consisting of cashing of checks in return for services rendered. See page 4 of this brief.)

Testimony Concerning Check Transactions With Stout & Co. and Forwarding of Deposits to Meet Checks

(From examination in supplementary proceedings of December 16, 1938, page 1588 *et seq.* of record, Government's Exhibit 95):

* * * * *

1589 Q. Do you make any deposits in that bank (First National Bank of Petosky; Michigan) in your father's account? A. I do not.

1589 Q. Have you ever made any deposits in that account? A. Never.

(From examination in supplementary proceedings of July 20, 1939 p. 1591 *et seq.* of record, Government's Exhibit 95):

1594 Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan? A. Not for quite some time.

* * * *

1594 Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account? A. I think money was sent to Petosky when my father was in the city.

* * * *

1594 Q. Have you ever within the last two months sent money to the Bank in Petosky for deposit with them in the account of J. Feldman? A. Never.

1594 Q. Do you know of any other person who sent money to the Bank at Petosky or to any other person for deposit in the Bank at Petosky? A. No.

(This testimony relates directly to the period of time when defendant was dealing with Stout & Co. and likewise covers an important element in the crime with which the defendant was charged, to wit, the forwarding of deposits to meet checks.)

• • •

1595 Q. Have you ever asked persons you were doing business with to send money to the Bank in Petosky? A. No.

1595 Q. Have you ever asked people you were doing business with to send money to persons in Petosky? A. No.

(Compare this testimony with the testimony of Goetz and Miller, pages 795-9 and 1440-6 wherein they say that at the identical time here involved both the defendant and the witnesses were sending money directly to the Bank and to other persons in Petosky, Michigan, for deposit in the Bank there to meet checks previously cashed.)

• • •

1595 Q. Have you ever cashed a check in New York City drawn on the Bank in Petosky, Michigan? A. Issued by who?

1595 Q. By anybody. A. Yes.

• • •

1595 Q. How long ago did you cash the last check? A. Over two years ago.

(This testimony involves the cashing of checks during the period of Stout & Co. transactions at a time when, as appears hereinafter, defendant was penniless.)

Appendix

(From examination in supplementary proceedings of September 29, 1939 page 1604, *et seq.*, of record, Government's Exhibit 95-B):

* * *

1606 Q. Have you ever made deposits in the account of J. Feldman in the First National Bank? A. Never made a deposit.

1606 Q. Have you ever caused a deposit to be made in that account through the medium of another person? A. Yes.

* * *

1607 Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman of Petosky, by him to be deposited in the account of J. Feldman, is that correct? A. Yes.

Testimony Concerning Inability of Petitioner to Meet Checks Cashed with Stout & Co.

(From examination in supplementary proceedings of December 16, 1938 pages 1588 *et seq.*, of record, Government's Exhibit 95):

1588 Q. Is it a fact that you have been subsisting entirely on moneys sent you by your father? A. Of late, yes.

1588 Q. When you say of late, what period of time does that cover? A. Within the last year and a half.

1588 Q. Would it include the entire period when you were a resident at the Essex House and Navarro Hotel? A. No, because I was making money up until two years ago.

* * *

1589 Q. Do you maintain in your own name any brokerage account at the present time in any brokerage house whatsoever? A. No.

(From examination in supplementary proceedings of July 20, 1939 page 1591 *et seq.* of record, Government's Exhibit 95):

1594 Q. When was the last time that you got money of any kind from anybody? About how long ago? A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

1594 Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year? A. Outside of help.

1594 Q. What help did you get? When and from whom? A. Most of my help was from different members of my family.

(From examination in supplementary proceedings of October 26, 1938, page 1598, *et seq.* Government's Exhibit 95-A):

1599 Q. Have you a bank account? A. I have none.

* * *

1599 Q. Do you now maintain a brokerage account in New York? A. I have none.

* * *

1599 Q. What is the nature of your business? A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.

1599 Q. You are what is called a fur broker? A. Right.

* * *

1600 Q. Are there any moneys due from customers to you? A. Haven't been able to do any business for eight months.

1602 Q. Is there anybody who owes you money? A. Nobody.

(This testimony was taken at the very time defendant was cashing checks with Stout & Co. in New York.)

(From examination in supplementary proceedings of September 29, 1939, page 1604, *et seq.* of record, Government's Exhibit 95-B):

1604-5 Q. So that for the entire duration of this examination, which is approximately one and a half years or thereabouts that (money sent by his father) has been the sole source of your income? A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time. (Matter in parentheses ours.)

(From examination in supplementary proceedings of September 6, 1939, page 1616 of record, Government's Exhibit 101):

1619 Q. Did you file an Income Tax return for 1938? A. Yes.

1619 Q. What earnings did you list? A. None.

(How could the Government more clearly and prejudicially prove the defendant's lack of means at the time he was cashing large checks with Stout & Co.?)

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 6 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

JAMES MARSHALL,
Attorney for Petitioner.

Of Counsel:
SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

Dated, New York, December 1, 1943.

INDEX

	PAGE
Opinion Below	1
Jurisdiction of This Court	1
Specification of Errors	2
History of Case	3
Summary Statement of the Matter Involved	3
The Objectionable Testimony	5
Argument—Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation	7
Shifting Theories in Support of Admissibility	13
The Solicitor General's Theory	16
Supplementary Proceedings Testimony Subsequent to March, 1938	17
Supplementary Proceedings Testimony Prior to March, 1938	23
The Supplementary Proceedings Examination Were "Testimonial"	26
Basic and Fundamental Rationale	29
Summary	37
Conclusion	38
Appendix I—Excerpts from Examinations in Supplementary Proceedings after March, 1938	39
Appendix:	
Section 338, Title 18, U. S. Code	45
N. Y. Civil Practice Act, Sec. 789	46

Table of Cases Cited

	PAGE
Boyd v. U. S., 116 U. S. 616, 635 (1885)	8
Bram v. U. S., 168 U. S. 532 (1897)	19, 30
Brown v. Mississippi, 297 U. S. 278 (1935)	33
Brown v. Walker, 161 U. S. 591, 596 (1895)	10, 11, 30
Chambers v. Florida, 309 U. S. 227 (1940)	33
Clark v. State, 68 Fla. 433, 67 So. 135 (1914)	11, 12, 13, 29
Dunham v. Ottinger, 243 N. Y. 423 (1926)	11, 21, 23
Ensign v. Pennsylvania, 227 U. S. 592 (1913)	27
Hale v. Henkel, 201 U. S. 43, page 69	13
Jack v. Kansas, 199 U. S. 372	10, 11, 21, 24, 25, 37
McNabb v. United States, 318 U. S. 332 (1942), at pages 340, 344 and 345	34, 35
Northern Securities Co. v. U. S., 193 U. S. 397, 400	9
People v. Carlson, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927)	9, 25
People v. Doyle, 58 Hun 535 (N. Y., 1890)	9
Regina v. Garbett, 2 Car. and K 474 (England, 1847)	27
Safarik v. U. S., 52 F. (2d) 892, 897 (C.C.A. 8th, 1933)	8
State v. Verecker, 124 Me. 178, 180 (1924)	9, 13, 29
United States v. Monia, 317 U. S. 424 (1943)	21
United States v. Mulligan, 268 Fed. 893 (1920)	28
U. S. v. Murdock, 284 U. S. 141	11, 13
U. S. v. St. Pierre, 132 F. (2d) 837 (C.C.A. 2d, 1942); certiorari granted, 318 U. S. 769, 63 Sup. Ct. 769; appeal dismissed, 63 Sup. Ct. 910	9, 31, 36
U. S. v. St. Pierre, 128 F. (2d) 979 (C.C.A. 2d, 1942)	10
United States v. Sullivan, 274 U. S. 257 (1927)	29
United States v. Weisman, 111 Fed. 2nd 260 (C.C.A. 2nd, 1940), at page 262	22

PAGE

Vause v. United States, 53 Fed. (2d) 346 (C.C.A. 2d, 1931), cert. den., 284 U. S. 661 13

Wilson v. United States, 162 U. S. 613 (1896) 25, 26

Wood v. United States, 128 Fed. (2d) 265, at pages 278-279 (C.C.A., D. C., 1942) 36

Statutes Cited

New York Civil Practice Act (Article 45):
Sections 773-792 ..... 7, 23
Section 789 ..... 8, 9, 10, 16, 19, 21

New York Consolidated Laws (Cahill), c. 41, Sections 921, 925, 932, 938 22

New York Penal Law, Section 1292a 22

Constitution of the State of Florida, Section 12 ..... 12, 13

Constitution of the United States, Fifth Amendment 2, 7, 8, 12, 13, 14, 19, 23, 24, 25, 26, 27, 30, 32, 33, 34, 35, 36, 37

Authorities Cited

3 Howard St. Trials, 1315 30

Pittman: "The Colonial and Constitutional History of the Privilege against Self-Incrimination in America", 21 Va. Law Review 763-789 ..... 8, 30, 31, 32

8 Wigmore's Treatise on Evidence (3rd Ed., 1940):
Section 2251, page 309 36
Section 2259c 28
Section 2260 22
Section 2264, page 363 26
Section 2264, page 364 27
Section 2276, pages 450-451 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

There was no opinion written in the United States District Court, Southern District of New York, where the case was commenced and tried. The majority and dissenting opinions of the United States Circuit Court of Appeals for the Second Circuit are reported in 136 F. (2d) 394 and are printed in the record at pages 46 to 58 inclusive.

Jurisdiction of this Court

This is a review of a judgment of the Circuit Court of Appeals for the Second Circuit (R. 59) entered

June 24, 1943, affirming a judgment of conviction of the United States District Court for the Southern District of New York, wherein petitioner was found guilty of the offense of having used the mails in aid of a scheme to defraud, and was sentenced to a term of imprisonment for a period of five years with five years probation thereafter (R. 8). The petition for a writ of certiorari to the said Circuit Court of Appeals for the Second Circuit was filed July 23, 1943, and certiorari was granted October 11, 1943 (R. 62).

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code as amended.

Specification of Errors

The Circuit Court of Appeals erred:

> (1) Petitioner's constitutional right against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States was violated by the admission in evidence, as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York; and the Circuit Court of Appeals erred in sustaining this violation.

This error was assigned in the petition for the writ of certiorari and the order of this court allowing certiorari, filed October 11, 1943, granted the petition "limited to the question whether petitioner's testimony given in the New York supplementary proceedings was properly admitted in evidence at the trial" (R. 62).

History of Case

Petitioner was indicted in the United States District Court for the Southern District of New York on August 20, 1940, charged with the offense of having used the mails in aid of a scheme to defraud (R. 1-7).* The case was tried before Hon. Bascom Deaver, District Judge of the Middle District of Georgia, sitting temporarily in New York, and a jury, from June 22, 1942 to July 8, 1942. Petitioner was found guilty and was sentenced on July 9, 1942, to a term of imprisonment of five years and five year probation thereafter (R. 8). The sentence of imprisonment of five years was the maximum sentence that could be imposed on any one count in the indictment. Application for bail was denied and the petitioner was thereupon and has since been imprisoned under said sentence.

On appeal to the United States Circuit Court for the Second Circuit, the judgment of conviction was affirmed by a divided court (136 F. (2d) 394). The appeal was argued on February 9, 1943 and was decided eighteen weeks later on June 8, 1943, by a divided court. The order of affirmance was entered June 24, 1943 (R. 60). The majority opinion in the Circuit Court of Appeals was written by Circuit Judge Thomas W. Swan (R. 47-56) and the dissenting opinion by Circuit Judge Charles E. Clark (R. 56-58).

Summary Statement of the Matter Involved

The indictment charged the defendant with a scheme to defraud by means of "kiting" checks (R. 1-7). In

* "R" refers to Transcript of Record printed in this Court subsequent to the granting of the Writ. Compare "CR" references; see footnote at p. 4, *infra*.

essence, it was alleged that the petitioner in New York City and elsewhere cashed checks drawn on an account in Michigan in which there were insufficient funds and that he thereafter cashed additional checks and wired to the Bank the cash proceeds of the later items in order to cover the earlier checks, petitioner relying on the usual passage of four days from the day of cashing to the date of clearance of each check. It was alleged that the petitioner continued this practice from August, 1936 to the date of the filing of the indictment in August, 1940 (R. 1-7).

At the trial the Government offered proof as to alleged defrauding in transactions with Essex House, Edward S. Reynolds and Stout & Co. (CR 1150-1).*

The indictment itself named only Essex House and Reynolds, but, by a bill of particulars served prior to trial, Stout & Co. was named as a victim (CR 14z). At the trial a substantial portion of the evidence consisted of facts relating to the defendant's transactions with Stout & Co. (CR 712-985, 1030-3, 1306-89, 1429-57).

At the trial and through the mouths of the Government's own witnesses it was shown that the alleged "kiting" and consequent alleged defrauding of the victims occurred with their affirmative knowledge and with their own active participation. The knowledge of the victims referred to was the awareness that the very checks that they were cashing for the defendant were at that time without funds behind them; that previously issued checks were being paid through the cashing of subsequent ones and that unless the victims would cash additional checks

* "CR" refers to Record filed on behalf of petitioner's application for the Writ. Pursuant to order allowing Writ, it is to be treated as though filed in response to Writ. By virtue of stipulation between Petitioner and Solicitor General, filed in this court, reference to this Record is permitted.

the earlier ones could not be paid. In short, such knowledge has made each of the alleged victims a willing participant with the defendant in the transactions. The alleged victims were either knowingly accommodating the petitioner (as in Essex House and Reynolds) or there was a financial business arrangement involving the planned cashing of these checks as compensation to the petitioner for services being rendered (as in Stout & Co.). The nature of the evidence developed at the trial was so unconvincing of any fraud that it led Judge Clark in the Circuit Court below to state:

> "The present is one of those disturbing cases where the conduct of the defendant is most unattractive, to put it mildly; and yet there was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished." (R. 56).

With respect to the Reynolds transaction, Judge Clark declared that the evidence pointed

> "more in the direction of a violation of agency instructions than an intent to defraud by mail" (R. 57)

and he concluded his opinion by stating

> "I must express my fear that defendant was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail." (R. 58).

The Objectionable Testimony.

In an effort to prove out of the petitioner's own mouth* that he had evolved a scheme to defraud, the Government offered and the Trial Court admitted into evi-

*Petitioner chose to remain mute at the trial in accordance with his basic rights and did not take the stand as a witness on his own behalf.

dence, over objection and exception and claim of violation of petitioner's constitutional rights, testimony compulsorily taken under oath in the Courts of the State of New York at various times by virtue of the statutes and laws of the State of New York. The introduction of this testimony into evidence occurred towards the end of the prosecution's case. It took up approximately one and one-half days of court time and the matters contained therein were strongly commented upon by the prosecutor in summation notwithstanding continued objection by petitioner (R. 10-12). These supplementary proceedings were offered to prove the alleged "kiting" of checks with Essex House and Stout & Co. by the method as set out in the indictment, that is, the cashing of checks at regular periods, the wiring forward of sums received from the later checks to meet the earlier cashings, and the inability of the defendant to meet the checks issued by any other method than the "kiting". In addition, the supplementary proceedings were used to prove the relationship of the defendant with the alleged victims, the general financial condition of the petitioner and other matters of a generally prejudicial nature to him. In fact, the prosecution used the supplementary proceedings examinations to establish each and every fact which it was required to prove in order to maintain a case under the statute upon which the indictment was based.

The nature of the supplementary proceedings examinations admitted into evidence was such that even the majority below admitted that

> "if the objection was well taken the judgment must be reversed." (R. 50).

ARGUMENT

Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation.

The Government introduced at the trial testimony compulsorily given by the petitioner, Samuel H. Feldman, on ten occasions in the courts of the State of New York in supplementary proceedings under an Immunity Statute (R. 12-43). This testimony was offered and admitted near the end of the Government's direct case. The judgment creditors' attorneys who had conducted these examinations of the petitioner in the State Court appeared as witnesses for the Government; certain portions of the examinations were offered in evidence (R. 12-43), read to the jury and stressed by the prosecutor on summation (R. 10-12).

The Government used the supplementary proceedings examinations of the petitioner in an effort to prove out of the defendant's own mouth each and every fact required to establish a case under the statute upon which the indictment was based.

The testimony given by the petitioner on various occasions from 1936 through 1939 was given pursuant to the laws of the State of New York and particularly the Supplementary Proceedings Statutes (Article 45, Sections 773-792, *New York Civil Practice Act*). The attendance and testimony of the petitioner at those examinations was

compulsory and the petitioner was protected in the State of New York upon the giving of such testimony under Section 789 of that Act.

The Fifth Amendment of the United States Constitution provides that no "person shall be compelled in any criminal case to be a witness against himself". In accordance with that constitutional right, the defendant, in the case at bar, chose to remain mute and elected not to testify at his trial. Nevertheless, through the admission of the supplementary proceedings examinations, he was, in effect, compelled to be a witness against himself in violation of the Fifth Amendment.

The constitutional protection against self-incrimination is a sacred right guaranteed by the Bill of Rights. It has been held that it should be "liberally construed" in favor of defendant.

> *Boyd* v. *U. S.*, 116 U. S. 616, 635 (1885);
> *Safarik* v. *U. S.*, 52 F. (2d) 892, 897 (C.C.A. 8th, 1933).

That the said constitutional protection against self-incrimination, guaranteed by the Fifth Amendment, was deeply rooted in the laws of the colonies even prior to the adoption of the Constitution of the United States and was well recognized as one of the fundamental rights, endeared to the founders of this country through historical background and suffering, has been amply demonstrated.

> (See Discussion in Pittman: "*The Colonial and Constitutional History of the Privilege against Self-Incrimination in America*", 21 Va. Law Review 763-789.)

It is also clear that the intention was to incorporate the entire common law privilege into the Constitution,

and that this Court has given it a historical interpretation.

> (See Dissent of Frank, J., at page 848, in *U. S.* v. *St. Pierre*, 132 F. (2d) 837 (C.C.A. 2d, 1942); certiorari granted 318 U. S. 769, 63 Sup. Ct. 769; appeal dismissed 63 Sup. Ct. 910.)

It has been appropriately said that historical liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

> (Holmes, J., in *Northern Securities Co.* v. *U. S.*, 193 U. S. 397, 400.)

In the State of New York, a judgment debtor can be compelled to appear in court and give testimony concerning his affairs under oath. He may not refuse to testify under penalty of a contempt order resulting in fine or imprisonment (*New York Civil Practice Act*, Sec. 789).

However, such testimony cannot be used against him in any criminal proceeding in the State (*People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927)). The prohibition against this use in any way is so strong that its admission is reversible error even though no exception was taken (*People* v. *Doyle*, 58 Hun 535 (N. Y., 1890)).

It is not claimed here, nor was it claimed in the Circuit Court below, that the New York State Statute immunized the petitioner against prosecution in the Federal Court.* However, by reason of that State's Statute, the

* It can well be argued, and there is some authority to the effect, that, by reasons of comity, where a person is compelled to answer questions under the immunity Statute of one jurisdiction, another jurisdiction should not allow that testimony to be used there against him. See *State* v. *Verecker*, 124 Me. 178, 180 (1924).

petitioner was compelled to testify in the New York Court no matter how incriminating such testimony might be. He had no right in the New York Court to refuse to answer in that proceeding on the ground of self-incrimination under the Fifth Amendment.

Jack v. *Kansas,* 199 U. S. 372;
cf. *Brown* v. *Walker,* 161 U. S. 591 (1895).

In *Jack* v. *Kansas, supra,* a State Anti-Trust Statute compelled testimony to be given in the State Court and provided an immunity similar to that contained in Section 789 of the New York Civil Practice Act referred to above. The petitioner had refused to testify, nevertheless, and raised his constitutional privilege, claiming that the State Immunity Statute did not protect him against prosecution under the Federal Anti-Trust Act. The Kansas Court held him in contempt and sentenced him to be imprisoned. This Court affirmed the judgment of the State Court on the ground that the danger of a Federal prosecution was remote and that it did not believe that the evidence would be availed of by the government for the purpose of prosecution.

Similarly, in *Brown* v. *Walker, supra,* a like rule was laid down where there was a Federal Immunity Statute, and the petitioner attempted to refuse to answer under a claim of privilege against self-incrimination under the State law.

A very late pronouncement of the lack of privilege in one jurisdiction against possible incrimination in another jurisdiction is contained in *U. S.* v. *St. Pierre,* 128 F. (2d) 979 (C.C.A. 2d, 1942).

"But the asserted privilege is non-existent when the answer sought would not tend to show commis-

sion of a federal crime by a witness. That it would tend to show commission of a crime under such law is irrelevant. *U. S.* v. *Murdock,* 284 U. S. 141." (p. 980)*

If is the use in the Federal Court below upon the trial of petitioner, over his objection, exception and claim of violation of his constitutional rights, of his testimony in the supplementary proceedings in the courts of the State of New York, under penalty of fine and/or imprisonment, given at a time when under prevailing decisions of this Court and the New York Courts, he had no choice, that is assigned here as error.

That danger which this Court in *Jack* v. *Kansas, supra,* believed was "too remote" and which this Court, in *Brown* v. *Walker, supra,* regarded as a "remote and naked possibility of imaginary and unsubstantial character" (pp. 599-600) has come to pass. That type of evidence which this Court could not believe would ever be availed of by the government was used by the prosecution in the case at bar to effect the conviction of this petitioner.

There is only one case in the entire country, a decision of the highest court of the State of Florida, *Clark* v. *State,* 68 Fla. 433, 67 So. 135 (1914), which has passed upon this important constitutional question, and that decision supports the petitioner's contention herein. The majority of the court below argued that the *Clark* case was not controlling because it presented the converse of the situation at bar. It might just as well be argued that the decision in *Brown* v. *Walker, supra,* did not irresistibly lead to the decision in *Jack* v. *Kansas, supra.*

* The courts of the State of New York follow this rule as to the non-privilege of a person in one jurisdiction against incrimination in another jurisdiction. See *Dunham* v. *Ottinger,* 243 N. Y. 423 (1926).

Judge Clark, however, in his dissent below, stated that while the law was not settled, he believed that the *Clark* case stated the better rule unless "we definitely wish to trap persons between the interstices of the overlapping State and Federal sovereignties" (R. 57).

In the *Clark* case, *supra*, the defendant was indicted in the State Court for the crime of embezzlement. Section 12 of the Constitution of the State of Florida is the counterpart of the Fifth Amendment of the Constituiton of the United States relating to self-incrimination. Clark, a bankrupt, had testified at the first meeting of creditors in the Federal Court, pursuant to the Bankruptcy Act. Under another section of that Act, he was given protection in the Federal Court by virtue of such testimony. The State Prosecutor in the subsequent embezzlement trial introduced into evidence notes taken by a court reporter at the bankruptcy hearing setting forth the testimony of Clark. On appeal, this was assigned as error. The Supreme Court of Florida held that the admission of that testimony, standing alone, was reversible error. It stated at page 436:

> "To permit the introduction of such proffered testimony would be violative of the provisions of Section 12 of the Declaration of Rights in our State Constitution in compelling indirectly at least, the defendant in a criminal case to be a witness against himself."

In connection with the *Clark* case, it is to be noted that the Court there, just as the petitioner does here, specifically disclaimed any reliance upon a possible doctrine that the immunity statute of one forum can give immunity from prosecution in another forum. The decision was based wholly upon the constitutional protection

of the Florida State Bill of Rights, which is the exact equivalent of the Fifth Amendment to the Federal Constitution.* The government below, the Circuit Court below, as well as the Solicitor General in this Court in opposing the application for the writ, have been unable to cite a single case holding directly to the contrary.

Shifting Theories in Support of Admissibility

An analysis of the arguments by the proponents of admissibility of the supplementary proceedings examinations shows that they have been unable to agree on any one legal theory. For example, the theory of attempted justification by the United States Attorney in the court below, who relied on *Vause* v. *United States*, 53 Fed. (2d) 346 (C.C.A. 2d, 1931), cert. den. 284 U. S. 661, was promptly discarded by the majority below (R. 52) which then proceeded to advance a theory of its own.

The majority admitted, however, that it was unable to find any decision directly supporting the view that the testimony was admissible (R. 52). It apparently relied on a series of cases in this Court wherein it was held that a person may not raise a privilege against self-incrimination in one jurisdiction upon the ground that his answers may tend to incriminate him under the laws of another and different jurisdiction.** Obviously this is not determinative of the case at bar. In the present case, the problem is the validity of the use in another jurisdiction of the testimony which defendant had theretofore been compelled to give in the first jurisdiction. That problem has been raised only by *Clark* v. *State*,

* It would appear that the State of Maine would reach a like result under similar circumstances but upon a doctrine of comity. See *State* v. *Verecker*, 124 Me. 178, 180 (1924).

** *U. S.* v. *Murdock*, 284 U. S. 141; *Hale* v. *Henkel*, 201 U. S. 43, at page 69.

supra, and was there decided in a manner favorable to petitioner.

The majority of the Circuit Court below argued further that even if there were a violation of the Fifth Amendment "the record here fails to show wherein the appellant suffered prejudice" (R. 53). It is impossible to reconcile such attempted justification by the majority at that point with that portion of their opinion wherein they state (with respect to the objectionable testimony) that "if the objection was well taken, the judgment must be reversed" (R. 50).

A mere cursory reading of the damaging and highly inflammatory testimony given by the petitioner under compulsion in the State Courts will clearly spot-light the prejudice that the majority below presumably was unable to find.

Apparently, unconvinced of the soundness of their general ruling at this point, the majority below isolated one out of the ten examinations in supplementary proceedings, that taken in July, 1937 (R. 53), attempted to justify its particular admission into evidence and then brushed aside the remaining and additional supplementary proceedings at later dates (Government Exhibits 95, 95A, 95B, 100, 101, R. 13-35) upon the ground that they could have had no substantial effect upon the jury's verdict. A reading of these other supplementary proceedings will clearly establish that any one of them, and certainly all of them together, must have had a tremendous effect upon the jury.

However, the argument for the admissibility of the testimony in the July, 1937 supplementary proceedings falls of its own weight upon even the slightest analysis. The majority states that petitioner could not have had a

privilege in July, 1937 against testifying as to a crime he did not commit until August (R. 39). A reading of the indictment (R. 1-7) shows that the scheme to defraud in question was alleged to have commenced on July 1, 1936 and to have continued up to and including the date of the filing of the indictment, to wit, August, 1940. At the time petitioner testified in supplementary proceedings in the State Courts in July, 1937, he was, according to the indictment and the proof elicited at the trial below, right in the midst of the crime in question. In fact, the supplementary proceedings testimony of July, 1937 was admitted for the very purpose of proving an essential element of the crime charged, to wit, "kiting" in 1937 (R. 10).

Again, reliance was placed by the Circuit Court majority on the fact that the Government had delayed the indictment until August, 1940 and had thereby allegedly given petitioner immunity against prosecution for offenses committed prior to August, 1937, and, therefore, had rendered admissible the testimony in question. The fact is that the indictment charged (R. 1-7) and the jury found (R. 8) that petitioner, from January 1, 1936, up and through August, 1940, devised a scheme to defraud and mailed certain letters in furtherance thereof. It is difficult to understand what sort of immunity was given by the Government's failure to indict sooner. This argument of the Circuit Court evades the issue entirely. The test is *not* whether the delay in indicting gave petitioner a form of immunity from punishment. The test *is* whether the state testimony, when elicited, was compulsory and self-incriminating. If it was, it was tainted—so far as its subsequent use against the defendant was concerned. In any event, there can be no gainsaying that essential, vital and highly prejudicial evidence proving a

basic and necessary element of the Government's case was established by means of that compulsory testimony theretofore given in the State Courts. Consequently, there was a clear deprivation of petitioner's constitutional right against self-incrimination. Judge Clark, in the dissenting opinion below, states unequivocally:

> "In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the Statute of Limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by McNabb *v.* United States, 63 S. Ct. 608, 613." (R. 58)

The majority of the Circuit Court below took some eighteen weeks to render its opinion affirming the judgment of the District Court. The Solicitor General, however, in this court, in opposing the application for the writ, completely jettisoned the reasoning of both the Circuit Court majority and of the United States Attorney. The respondent insists that the right result was reached and offers a new and different theory in its support.

The Solicitor General's Theory

The Government in this Court has for the first time (in opposing the application for a writ of certiorari) divided the supplementary proceedings testimony taken on some ten occasions over a period of four years in four independent actions into those taken prior to March, 1938, and those taken subsequent thereto.*

* This was done apparently in an effort to persuade this Court that the constitutional problem was not raised in this case and that the judgment below could be affirmed on some basis of non-prejudice. An amendment to the Immunity portion of the New York State supplementary proceedings statute (Civil Practice Act, Sec. 789) became effective on March 14, 1938.

Supplementary Proceedings Testimony Subsequent to March, 1938

The Solicitor General argued that the testimony in the five supplementary proceedings examinations taken subsequent to March, 1938 (R. 13-32, 33-36) were properly admitted at the trial (over objection and exception) because (a) that testimony was merely cumulative of testimony taken in the earlier supplementary proceedings and therefore was not prejudicial; (b) the petitioner must be charged with having waived his privilege against self-incrimination under the Fifth Amendment by reason of his testimony in the other and earlier supplementary proceedings examinations; and (c) such testimony was in any event admissible because, on its face, it was not *per se* incriminating. The record alone disproves the first contention; the law invalidates the second; both the record and the law defeat the third.

The record shows that a vital part of the prosecutor's case at the trial consisted of proof that during 1938-1939 the petitioner allegedly "kited" many hundreds of thousands of dollars in checks by cashing them with Stout & Co., as a result of which it was claimed this company was defrauded of $81,000.*

The transactions with Stout & Co. did not commence until the fall of 1938 and the proof covered a period time beginning in the fall of 1938 and ending in the spring of 1939 (CR 714-715, 852-855). The supplementary proceed-

* Whether Stout & Co. (a partnership) was a part of the scheme to defraud, as indicated by the indictment as amplified by the bill of particulars, wherein it was named as a victim, (p. 14z) or whether the transactions with Stout & Co. were in the nature of similar acts, as the Government now contends, is unimportant at this point because, in any event, no one reading the record can gainsay that the evidence presented as to Stout & Co., and the Judge's charge in connection therewith, made it a vital part of the proof presented to the jury for the purpose of convincing it that the defendant should be convicted of the crime charged in the indictment.

ings testimony taken prior to March, 1938, concerned the defendant's situation and conduct during and prior to 1936-1937* and obviously could not concern or relate to his situation or conduct with respect to 1938-1939, at which time he was involved with Stout & Co.

To establish the crime charged against the defendant as to Stout & Co., the government attempted to—indeed had to—prove a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as prove the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn. Proof of all of these elements was necessary in order to sustain this phase of the government's case and a failure of proof as to any one of them would be fatal to the prosecution's position. The record discloses that essential evidence as to the petitioner's relations with Stout & Co., of his check "kiting" activities with them and of his inability and lack of power to pay the checks theretofore cashed with Stout & Co., was supplied by the defendant's compulsory testimony in supplementary proceedings taken subsequent to March, 1938.** It is patent on the face of this record that the 1938-1939 supplementary proceedings testimony concerning and relating to Stout & Co. could not be and were not cumulative of the supplementary proceedings testimony taken in 1936-1937, during which period the petitioner was active in connection with the Essex House and Reynolds House transactions, and which latter period was well over a year prior to the inception of the Stout & Co. transactions and had

* This was the period of time during which the defendant had transactions with Essex House and Reynolds.

** See Appendix I hereto, pp. 39-44; to facilitate analysis we have appended therein illustrative portions of the supplementary proceedings testimony subsequent to March, 1938.

no relation to them. Therefore the government's contention that the violation of petitioner's rights under the Fifth Amendment should be overlooked by reason of the cumulative quality of the evidence admitted, must fail.

This Court has indicated on prior occasions its attitude toward such a claim. In *Bram* v. *U. S.*, 168 U. S. 532 (1897), Mr. Justice White at page 541 stated as follows:

> "It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt."

The government also attempted to make use of the alleged cumulative quality of the supplementary proceedings examinations subsequent to March, 1938* by arguing that the petitioner waived his constitutional privilege under the Fifth Amendment with respect to that admittedly compulsory testimony by reason of his having

* As to this testimony, the government concedes that the Immunity Statute of the State of New York was valid and complete after March, 1938, and that thereafter the defendant, as a subpoenaed party, had no choice but to comply with the subpoena and to answer the questions propounded. (See Appendix II of this brief embodying original and amended Section 789, New York Civil Practice Act, page 46.)

testified in certain supplementary proceedings in 1936-1937.

With respect to the 1938-1939 testimony, not only did it concern, as above indicated, transactions and conduct covering a different period of time from that treated in 1936-1937 examinations, but four out of the five examinations in 1938-1939 had been conducted pursuant to a civil judgment against the defendant in a case (*Moyer* v. *Feldman*)* entirely separate from and unconnected with the civil cases, *Hearst Hotels Corp.* v. *Feldman, Corwend Corp.* v. *Feldman, 58-59 Realty Corp.* v. *Feldman,*** pursuant to which the defendant had been examined in 1936 and 1937.

The Solicitor General relied on Sec. 2276 of Vol. 8 of *Wigmore's Treatise on Evidence* (3rd Ed., 1940), for authority to the effect that there was a waiver of the constitutional privilege against self-incrimination as to the 1938-1939 testimony by reason of the 1936-1937 testimony. That section can give little comfort to the Government's position in view of the fact that, as shown above, the testimony was taken in different proceedings, related to transactions at other and different times, and was admitted in the trial court as evidence of fraud in the Stout & Co. transactions, whereas the 1936 and 1937 testimony referred to the defendant's transactions and conduct as bearing upon Essex House and Reynolds as alleged victims. Applying the test set forth in Wigmore's Treatise,*** it is apparent that there was no waiver in

* R. 13-31 incl.
** R. 31-42 incl.
*** In order to have a waiver operate, not only must the later and other examinations refer and relate to the same transactions and alleged illegal acts but the waiver "is limited to the *particular proceeding* (italics ours) in which he thus volunteers testimony." *8 Wigmore on Evidence* (3rd Ed. 1940), Section 2276, pages 450-451. In the case at bar there were, as seen above, four different particular proceedings.

the case at bar. If the Solocitor General's theory be correct, then once a debtor has testified in supplementary proceedings without raising his privilege against self-incrimination (assuming that such privilege existed at the time), he has forever debarred himself from raising that constitutional privilege in subsequent examinations in different proceedings, even though the subsequent and different examinations relate to other facts, situations and crimes. The fallacy of this theory is apparent on its face. If there had been a waiver it could operate only as to the transactions which the earlier testimony directly concerned and it could not operate *in futuro* as to different facts, different situations and different alleged illegal acts.

The final argument of the Solicitor General as to the compulsory supplementary proceedings testimony taken subsequent to March, 1938, was that these examinations were not clearly on their face *per se* wholly incriminating, and therefore the petitioner could not receive the protection of the immunity statute of the State of New York.*

The elements of the mail fraud scheme charged in the case at bar consisted of proof that the defendant had cashed checks with the alleged victims, 1) at a time when he had insufficient funds in the bank to clear those checks, 2) when he was without the means or resources to meet them, and 3) that he cashed additional lafer checks to provide the funds to meet the earlier ones. It is obvious from the excerpts of the 1938-1939 supplementary proceedings set forth in Appendix I hereto that those supplementary proceedings examinations were greatly preju-

* A person receives the protection of the New York State immunity statute by testifying in conformity with it and does not have to refuse to answer first to secure its protection. Section 789 C. P. A.; cf. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926) and *United States* v. *Monia*, 317 U. S. 424 (1943). Of course, it is clear that in any event a person testifying in the courts of the State of New York, is unable to claim a privilege as to incrimination under the federal law. *Jack* v. *Kansas*, 199 U. S. 372 (1905).

dicial to the petitioner, highly relevant and most important to the prosecution's charge of a federal crime and, needless to say, were most incriminating. That same testimony was also most incriminating under various criminal statutes of the State of New York.*

That this type of testimony receives the protection of the constitutional privilege and accordingly, of the immunity statute, admits of no doubt. It is not necessary that each piece of testimony prove the entire crime.** Moreover, the privilege against self-incrimination is not confined only to those instances where at least one of the definite elements of a crime is the subject of the testimony. As was said by Learned Hand, J., in *United States* v. *Weisman*, 111 Fed. 2nd 260 (C.C.A. 2nd, 1940) at page 262:

> "All crimes are composed of definite elements and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached . . ."

A fortiori, in the case at bar, where the supplementary proceedings testimony of 1938 and 1939 supplied *several* of the vital elements of the crime in the Stout & Company matter under federal law, as well as under state law, there can be no doubt as to the incriminatory nature of the testimony. Accordingly, this portion of the Government's claimed justification falls of its own weight.

---

* See *New York Consolidated Laws* (*Cahill*), c. 41, Sections 921, 925, 932, 938, and *New York Penal Law*, Sec. 1292a.

** "Most criminal acts are made up of two or more subordinate facts each essential to the completed crime * * *. In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole." *8 Wigmore, Evidence* (3rd Ed. 1940), Section 2260.

The prosecution has therefore signally failed to prove that no violation of the Fifth Amendment occurred by reason of the admission of the supplementary proceedings subsequent to March, 1938. The admission into evidence of those five prejudicial supplementary proceedings examinations must, standing alone, result in a reversal of this conviction.

Supplementary Proceedings Testimony Prior to March, 1938

Even as to the supplementary proceedings testimony taken prior to March, 1938 and admitted into evidence in the District Court below over petitioner's objections, it is well settled law that, at the time he gave that testimony pursuant to subpoena in the state court, the petitioner could not raise a privilege against self-incrimination under the Fifth Amendment in that his testimony might incriminate him under the federal law. *Dunham* v. *Ottinger, supra.* It can hardly be argued that there was a waiver of that privilege by the petitioner at the time he testified in the state court in view of the fact that he had no federal privilege at that time, and the mere raising of it would have been a futile gesture. Equally invalid is any contention that if the petitioner might have raised a state privilege (under the then form of state immunity statute) as to the 1936-1937 testimony and failed to do so, he thereby waived a federal privilege which he did not at that time have.

The 1936-1937 supplementary proceedings examinations were taken pursuant to the laws of the State of New York and particularly the supplementary proceedings statutes (Article 45, Section 773-792, *New York Civil Practice Act*). The attendance of petitioner at those examinations was compulsory. He was required to an-

swer the questions put to him and he was forced to give answers even though those answers might incriminate him under a federal statute. *Jack* v. *Kansas, supra.*

The Solicitor General has interjected the question of the validity of that portion of the supplementary proceedings statute which refers specifically to the immunity given in the State of New York. That immunity statute, valid or invalid, could, of course, give no immunity for prosecution in the federal court. Any protection that the defendant might have against incrimination under the federal law would arise out of his rights under the Fifth Amendment; and under *Jack* v. *Kansas, supra,* that right did not exist and could not be raised in the state court. Accordingly, the first time that the petitioner could avail himself of the protection of the Fifth Amendment was when the testimony was offered against him in the trial court below, and at that time he did seek that protection in no uncertain terms.

Whatever the effect of the validity or the partial validity of the New York State immunity statute (or for that matter the entire absence of any immunity statute) might have on the privilege of the defendant to refuse to answer questions in supplementary proceedings, the answers to which might incriminate him under a New York State law, that question is entirely irrelevant here. The sole issue in the case at bar, even as to the 1936-1937 testimony, is: Whether petitioner, who had theretofore been subpoenaed under the laws of New York and had pursuant thereto given testimony under oath which incriminated him under the federal law (and, at the time of testifying, he had no privilege to refuse to answer on the ground of incrimination under the federal law) is entitled to assert his right to the protection of the Fifth Amendment when that testimony is subsequently offered

against him in the federal court? The problem is simply one of whether, as the minority analyzed it in the Circuit Court below, a person is to be trapped between the "interstices" of overlapping state and federal sovereignties.*

The Solicitor General, in opposing the application for the writ herein, attempted to bring the situation here within the doctrine of *Wilson* v. *United States,* 162 U. S. 613 (1896).

The *Wilson* case was one where the defendant had given a voluntary statement, not under oath, to the United States Commissioner, and that statement was subsequently used in his trial in the United States court. At the time that the statement was given, the petitioner there could have raised his constitutional privilege under the Fifth Amendment, but failed to do so. The statement itself was finally admitted in the federal court. There was no question of overlapping and different jurisdictions nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, waives it. Indeed, on the precise facts of the *Wilson* case, it is one dealing with the voluntary nature of a confession rather than with a waiver under the Fifth Amendment.

The *Wilson* decision is therefore in no way determinative of the case at bar which involves the problem of overlapping jurisdictions. This Court, in *Jack* v. *Kansas, supra;* at page 382, said that it did not believe that the evidence obtained compulsorily in the state court would be

* It must be noted that this testimony could never have been used against the petitioner in any New York State criminal proceeding (*People* v. *Carlson,* 222 App. Div. 54 (4th Dept., 1927).

used in the federal court, and the defendant was, therefore, directed to answer the questions in the state court. The case at bar presents the situation where that which this Court believed would never happen has, in fact, happened. Any contention that *Wilson* v. *United States, supra,* or cases of its type are determinative of the question in the case at bar, is patently unsound.

The Supplementary Proceedings Examination Were "Testimonial"

The Solicitor General further claimed that the case at bar does not involve self-incrimination under the Fifth Amendment because the supplementary proceedings testimony is not "testimonial" in nature. It is true that the protection of the Fifth Amendment extends to "testimonial" matters only, but, by no stretch of the imagination, can the sworn testimony of the petitioner, pursuant to subpoena of a court of record of the State of New York, be considered anything other than "testimony".

The Solicitor General relied upon the authority of a group of cases dealing with books, records and reports. Such cases are clearly inapplicable. *Wigmore's Treatise on Evidence,* in analyzing the "testimonial" protection given by the Fifth Amendment, says:

> "The privilege protects a person from any disclosure sought *by legal process against him as a witness.*" *

Such cases are readily distinguishable from the instant case, in that they fall within the rule that:

> "* * * documents * * * obtained from the person's control *without the use of process*

* *8 Wigmore* (3rd Ed.), Section 2264, page 363.

> *against him as a witness* are not in the scope of the privilege. . . ."*

In *Ensign* v. *Pennsylvania*, 227 U. S. 592 (1913), this Court, in defining "testimony", stated quite clearly that examinations under the Bankruptcy Act (similar in nature to supplementary proceedings in a state court), were "testimony" (see p. 599). There this Court drew a sharp distinction between the examination of a debtor and his sworn bankruptcy schedules filed in court.

Can the Government seriously contend that, had the testimony of the petitioner in the supplementary proceedings been proven in the trial court below by the oral testimony of the attorney who had conducted the examinations or by the reading of the stenographic minutes thereof, the petitioner's rights would have been different? Does testimony become any less testimony because it has been transcribed on paper?

In *Regina* v. *Garbett*, 2 Car. and K 474 (England 1847), the prosecutor in a criminal case offered in evidence, through the shorthand notes of a court reporter, the testimony of the defendant which had been given as a witness in a civil case and in which he had been directed to answer after having raised his privilege against incrimination. The majority of the court held the conviction was wrong and reversed the judgment.

From the holding in this case, it is clear that evidence given compulsorily under oath in a prior proceeding and admitted at the subsequent trial of the witness as a defendant in a criminal case is testimonial in nature whether

*8 *Wigmore, Evidence* (3rd Ed.), Section 2264, page 364. While it is not essential to petitioner's case, it is interesting to note that even as to books, records or chattels, there would be a violation of the Fifth Amendment if they were obtained from a defendant in response to a subpoena or other process treating him as a witness. *Wigmore*, same section.

the transcribed minutes be offered or the shorthand notes be read, and its admission is a violation of the privilege against self-incrimination.

The Solicitor General also was forced to seek the assistance of precedents in cases involving statutory requirements that a person file reports with a public agency. The best refutation of the applicability of that line of cases to the instant case is found in Section 2259c of *Wigmore's Treatise on Evidence* (3rd Ed.) entitled "Crime disclosed in (1) Public Books or (2) Books Required by Law to be Kept", which reads as follows:

> "The same reasoning applies to records required by law to be kept by a citizen not being a public official, e.g., a druggist's report of liquor sales or a pawn broker's record of pledges. The only difference here is that the duty arises not from the person's general official status but from the *specific* statute limited to a particular class of acts." (Italics ours.)

In that connection, in *United States* v. *Mulligan*, 268 Fed. 893 (1920), the court, distinguishing between records or reports required as an incident to the privilege of engaging in enterprises regulated by statute and testimony and private records, at page 897 said:

> "The privilege and immunity of a citizen in his private affairs is carefully safeguarded and distinguished. . . . Without such distinction of the rights of the individual in his private unregulated business from his status when engaged in business only by permission of the government and under government regulations, the safety of the nation might be in danger."

As a matter of fact, even as to reports required by governmental authority or agencies, such as income tax reports, it is doubtful whether a person could be required to set forth facts in such reports which would incriminate him (see *United States* v. *Sullivan*, 274 U. S. 257 (1927)).

In the case at bar, we are not dealing with books, records, chattels, reports or even documents. On the precise facts of the case at bar this Court's support of the Government's theory would establish the doctrine that a person's examination under oath, pursuant to subpoena of a court of record, is not "testimony". As well might it be said that the testimony of a defendant before a Grand Jury in violation of his constitutional rights against self-incrimination is, nevertheless, admissible against him at his trial, provided the minutes are transcribed and the typed document, rather than oral testimony concerning the same, is offered in evidence.

Basic and Fundamental Rationale

It has been claimed throughout this case by those who have defended the admission of the supplementary proceedings testimony that there are no cases squarely in point, but that there are available precedents, which, by analogy, are determinative of the problem. The petitioner, on the other hand, has constantly disputed the allegation that there is no authority precisely in point, and has heretofore cited *Clark* v. *State*, *supra*.*

The Government as well as the majority below relied on what they regarded as precedents by analogy. Perhaps as a result of the spectre of *stare decisis* hovering

* In addition, there is the indicated holding of the Maine court in *State* v. *Verecker*, *supra*.

over the Government, the Court below and the petitioner, the basic problem involved and the most direct approach to its solution may have been generally slighted. The most logical approach to its solution seemingly requires an analysis of the Fifth Amendment, and, more particularly, its historical background and basic purpose. It would be well, therefore, to inquire what, if anything, is inherent in the Fifth Amendment which would prevent this Court from giving its protection to the situation of the petitioner in the case at bar.

That portion of the Fifth Amendment that provides a privilege against self-incrimination had its roots in the early English Common Law, as well as in the early American Colonial Law.* The settlement of the English colonials in the new world took place at a time in English history when opposition to the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. This agitation against self-incrimination extended to both physical torture and compulsory oath and testimony thereunder.**

The trial of John Lilburn*** focused the attention of the whole of England upon proceedings in the Star Chamber, High Commission and other courts using *ex-officio* proceedings, wherein persons accused were forced to confess their crimes either by compulsion of oath or by physical compulsion. Lilburn had refused to take oath or answer against himself, and his attitude was representative of a like attitude of a multitude of others who refused

---

* *Brown* v. *Walker*, 161 U. S. 591, 596 (1895); *Bram* v. *United States*, 168 U. S. 632 (1897).

** Pittman: *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. Law Rev. 763.

*** *3 Howard St. Trials*, 1315.

to be sworn, or, having been sworn, refused to answer. This privilege became so well established in the general law of England as far back as the early 1650's that it was never thought necessary by any English Parliament to pass any law touching on that matter.

The agitation for the privilege against self-incrimination was not confined to England; it was carried over to America by the Puritans in our early Colonial history. The development of the privilege in the colonies combined, as in England, the agitation against both compulsory oath and the use of torture or physical compulsion.

We find that, in the early history of Massachusetts in 1642, it was well agreed that compulsory oath and testimony thereunder were banned, but there was some opinion disputing the proposition that confessions by torture should receive like protection.* To the Puritan's mind, then, to force testimony from an accused by means of an oath was worse than physical torture or "the third degree".**

Furthermore, clearly inherent and basic throughout the historical evolution of the privilege is the fact that the real evil which was to be guarded against was the use of the extracted testimony for the purpose of punishment

---

* Three ministers of Governor Bradford of Plymouth in 1642 to whom had been turned over the question of compulsory self-incrimination, agreed unanimously that compulsory oath was against both the laws of man and the laws of God whereas, by a majority of two to one, it was stated that physical compulsion could not be used. With respect to a compulsory oath, Mr. Reynor, one of the ministers, stated: "That an oath (*ex officio*) for such a purpose is no due means hath been abundantly proved by ye godly learned and is well known." Even Mr. Chauncy, another minister, who answered that there might be torture, stated with respect to the compulsory oath: "If it be *mente* of extracting by requiring an oath (*ex officio*), as some call it—I fear it is not safe, nor warranted by God's word, to *extracte* a confession from a *delinquente* by an oath." Pittman: *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. Law Rev. 763, at pages 777-779.

** See Frank, J., in *United States* v. *St. Pierre*, 132 Fed. (2d) 837 (C.C.A.) (2d) 1942) at page 842 of his dissent and authorities cited therein; 21 Va. Law Rev. at page 783.

of the guilty ones.* The fact that the testimony was used in a place different from that where taken did not remove or lessen the evil as to which protection was sought.**

Thus we see that the Fifth Amendment, in its protection against compulsory self-incrimination, was derived from both the Common Law of England and that of the Colonies, and historically was clearly intended to cover compulsory disclosure either by torture or by compulsory oath and the use of such compulsory testimony to secure the conviction and punishment of the alleged offender.

Admittedly, the case at bar is one which does not involve compulsory self disclosure by torture or by physical force, but it clearly involves compulsory oath and testimony thereunder, no matter how incriminating, under threat of imprisonment. There was just as much compulsion in the testimony of this petitioner under oath by virtue of the Immunity Statute as there would be if he had been compelled to testify by torture or physical force or threat thereof. As we have seen, historically the compulsion of testimony under oath was just as abhorrent and objectionable, if not more so, than the compulsory self-disclosure by torture or physical force.

Therefore, it is clear that the use of testimony in the Federal Court theretofore obtained by the compulsion

---

* It should be noted in England, too, there was great emphasis and agitation against compulsion under oath. Charles I in his letter to the High Commission in 1637 commanded the Commission to compel refractory persons to take an oath and testify against themselves on a penalty of being declared as confessed and convicted legally if they refused. The Trial of Lilburn which commenced in that same year, reflected the objection of the English people to that type of compulsion. In the demands and declarations sent from Cromwell's army in 1647 demand was made for the removal of compulsory oath.

Pittman: on *The Privilege Against Self-Incrimination*, 21 Va. Law Rev., at pages 770-773, inclusive.

** In the colonies, testimonial confessions used in court had frequently been secured in the first instance by the Governor and his Council, constituting the highest court of record. See *Pittman, supra*, at pages 784-5.

of an Immunity Statute is just as much a violation of the Fifth Amendment as would be the use in the Federal Court of testimony obtained in the State Court by means of coercion, torture or physical force or threat thereof. The testimony of the petitioner in the case at bar might, for the purposes of testing its admissibility in the federal court below, have been secured in the State Court in the first instance by the rack, the boot, the thumbscrew or the more modern rubber hose. Can it be seriously argued that the admission of such testimony in the Federal Court would not have been a violation of the Fifth Amendment?*

It would be impossible to distinguish between the case where the conviction of a defendant is secured by means of compulsory self-disclosure brought about by torture or coercion and a conviction secured by compulsory self-disclosure brought about by compelled oath and testimony thereunder. The facts may differ, but the fundamental principle remains the same. Courts must be cognizant of the fine line that can be drawn in the *administration* of law between one kind of compulsory self-incrimination and another. Physical violence to one man may be less terrifying than the threat of imprisonment to another as an inducement to give himself away and present the authorities with the means of convicting him.

Historically, logically and legally, therefore, not only is there nothing in the Fifth Amendment which would prevent this court lending its protection to the petitioner in the case at bar, but there is every reason for it to hold

* This Court has recently, in a series of decisions, reversed convictions obtained in State Courts where they were secured by the use of confessions extracted by force and coercion. *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1935). In the *Brown* case, at page 286, it was said, "it would be difficult to conceive of methods more revolting to the sense of justice." Could any less be said of torture, force or coercion to secure testimonial compulsion?

that the Fifth Amendment compels it to accord that protection in this case.

The Government, as well as the majority in the Circuit Court below, has not been able to cite a single case directly ruling the objectionable testimony to be admissible. As seen above, historically it would appear that the Fifth Amendment would bar the use of such evidence for the purpose of convicting a defendant. Is there any principle or policy set out by this court or by law of the land that would conflict with the decision contended for by this petitioner?

In a recent decision this court said:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."*

This court has indicated its concern

> "not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society."**

It has declared itself as opposed to

> "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection."***

---

* *McNabb* v. *United States*, 318 U. S. 332 (1942), at page 340.
** *Id.*, at page 344.
*** *Id.*, at page 344.

It could hardly declare itself any less opposed to easy but self-defeating ways in which testimonial compulsion is substituted for brains as an instrument for conviction of crime.

In the *McNabb* case, *supra*, statements were obtained by the Government without the necessary arraignment of the defendant as required by statute, but Congress had not expressly forbidden the use of the evidence so procured. This court reversed the conviction based on the admission of that evidence. It placed its decision upon the ground that

> "to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."*

Hardly less could be said of allowing a conviction to stand against this petitioner, secured by means of the compulsory self-disclosure made in supplementary proceedings in the courts of the State of New York. That this would be a stultification of the policy enunciated by the Fifth Amendment of the Constitution is clearly seen from the foregoing examination of the historical background of that amendment.

The scope which the courts may permissibly give the privilege against self-incrimination has been debated vigorously. In a recent case a federal court was called upon to rule on the applicability of the privilege to a somewhat new situation. Mr. Justice Rutledge, then sitting as a Circuit Court Judge, discussed the privilege against the background of the world today and said:

> "With world events running as they have been, there is special reason at this time for not relaxing the old personal freedoms won, as this one was,

* *McNabb* v. *United States*, 318 U. S. 332 (1942) at page 345.

through centuries of struggle. Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of decades.

Large in this is a sense of fairness to the person accused, a respect for his individual integrity, in accusation or even in guilt. But larger still is the sense of the court's own part in justice and its administration. By this we mean the sense of the citizen as well as of the court itself."*

An eloquent and moving plea in behalf of the Fifth Amendment is found in a recent case where Circuit Judge Frank stated that he was not moved

> "by any sentimental desire to protect criminals or by a desire to prevent as full judicial scrutiny as is practicable of the facts of cases. I am moved by fear of the consequences to democratic government in general and to the courts in particular, of judicial disregard of specific unrepealed sections of the Constitution. Courts, when they conduct themselves in that manner, invite popular rejection of our established legal institutions by unlawful means."**

An outstanding and eminent authority and text writer on the law of evidence has expressed similar forebodings when he said:

> "any system of administration which permits prosecution to trust habitually to compulsory self-disclosure as a source of proof, must itself suffer morally thereby."***

It must be apparent, therefore, that legal precedent, historical analysis and reasons of policy and principle

---

* *Wood* v. *United States*, 128 Fed. (2d) 265, at pages 278-279 (C.C.A., D. C., 1942).

** Frank, J., in *United States* v. *St. Pierre*, 132 Fed. 837 (1942), at page 850.

*** *8 Wigmore on Evidence*, 3rd Ed., Sec. 2251, page 309.

would all dictate a decision that the conviction in this case must be reversed because, in the words of Judge Clark in the court below "in plain fact he (petitioner) was required to incriminate himself." (R. 58) and the use of such testimony was violative of the privilege against self-incrimination under the Fifth Amendment.

Summary

This case is one in which the petitioner was compelled to give testimony in a New York State Court under oath and where the prosecutor in the Federal Court at a subsequent time used that compulsory testimony against him in order to secure his conviction. The admission of this testimony in the court below resulted in the accomplishment of what this Court in *Jack* v. *Kansas, supra,* believed could and would never happen. Allowing such testimony to be admitted against this petitioner did, in fact, trap him between "the interstices" of Federal and State Governments. That was accomplished in the case at bar through supplementary proceedings testimony elicited in a *civil* matter. Tomorrow it may well be a case in which a petitioner, by virtue of an immunity statute, has been compelled to incriminate himself before a State Grand Jury or State Administrative bodies or before State Legislative bodies, and such testimony is used in the Federal Court to secure his conviction of a federal crime. Whatever may be the means of compulsion, be it torture or compulsion under oath by virtue of an immunity statute, whether such testimony occurs in the course of criminal or civil investigation hearing or trial, the principle remains the same. The trapping between the interstices of State and Federal Government and the compulsory self-incrimination of the petitioner violates the spirit of the Fifth Amendment and stultifies its very purpose.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

JAMES MARSHALL,
Attorney for Petitioner.

Of Counsel:

SEYMOUR M. KLEIN,
HARRY L. WECHSLER,
MARVIN J. BLOCH.

APPENDIX I*

We here set forth some selected questions and answers appearing in the supplementary proceedings testimony (after March 1938) concerning the period of the Stout & Co. transactions.

Testimony Concerning Relationship With Stout & Co.

(From examination in supplementary proceedings of July 20, 1939, R. 16, *et seq.*, Government's Exhibit 95):

Record Page

17 Q. Where did you stay when you were in Florida? A. At El Mirasol Apartments.

17 Q. Where? A. Miami Beach.

17 Q. Did you keep an apartment there? A. I occupied a room.

* * *

17 Q. Whose office was it? A. Stout & Co.

* * *

17 Q. And who paid the rent for that room? A. it was given to me gratis.

17 Q. By whom? A. By Stout & Co.

* * *

17 Q. Who paid for your meals while you were in Florida? A. The firm paid all my expenses down there.

17 Q. Which firm do you refer to? A. Stout & Co.

17 Q. Were you employed by them? A. I was not.

17 Q. Did you have any arrangement with them under which they paid for your room and board? A. I was there as a friend of Mr. Miller's.

* * *

18 Q. Did you have any business transactions of any kind while you were in Florida from January first until you returned to New York City? A. None whatsoever.

---

* Referred to in footnote, page 18 of this brief.

Appendix I

(At the trial, petitioner's position was that he had had business transactions with Stout & Co. in Florida, consisting of cashing of checks in return for services rendered.)

Testimony Concerning Check Transactions With Stout & Co. and Forwarding of Deposits to Meet Checks

(From examination in supplementary proceedings of December 16, 1938, R. 13, *et seq.*, Government's Exhibit 95):

* * *

15 Q. Do you make any deposits in that bank (First National Bank of Petosky, Michigan) in your father's account? A. I do not.

15 Q. Have you ever made any deposits in that account? A. Never.

(From examination in supplementary proceedings of July 20, 1939, R. 18, *et seq.*, Government's Exhibit 95):

19 Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan? A. Not for quite some time.

* * *

19 Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account? A. I think money was sent to Petosky when my father was in the city.

* * *

20 Q. Have you ever within the last two months sent money to the Bank in Petosky for deposit with them in the account of J. Feldman? A. Never.

20 Q. Do you know of any other person who sent money to the Bank at Petosky or to any other person for deposit in the Bank at Petosky? A. No.

(This testimony relates directly to the period of time when petitioner was dealing with Stout & Co. and likewise covers an important element in the crime with which the defendant was charged, to wit, the forwarding of deposits to meet checks.)

* * * *

20 Q. Have you ever asked persons you were doing business with to send money to the Bank in Petosky? A. No.

20 Q. Have you ever asked people you were doing business with to send money to persons in Petosky? A. No.

(Compare this testimony with the testimony of Goetz and Miller, CR pp. 795-9 and 1440-6, wherein they say that at the identical time here involved both the petitioner and the witnesses were sending money directly to the Bank and to other persons in Petosky, Michigan, for deposit in the Bank there to meet checks previously cashed.)

* * * *

20 Q. Have you ever cashed a check in New York City drawn on the Bank in Petosky, Michigan? A. Issued by who?

20 Q. By anybody. A. Yes.

* * *

20 Q. How long ago did you cash the last check? A. Over two years ago.

(This testimony involves the cashing of checks during the period of Stout & Co. transactions at a time when, as appears hereinafter, petitioner was penniless.)

Appendix I

(From examination in supplementary proceedings of September 29, 1939, R. 27, *et seq.*, Government's Exhibit 95-B):

* * *

30 Q. Have you ever made deposits in the account of J. Feldman in the First National Bank? A. Never made a deposit.

30 Q. Have you ever caused a deposit to be made in that account through the medium of another person? A. Yes.

* * *

30 Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman of Petosky, by him to be deposited in the account of J. Feldman, is that correct? A. Yes.

Testimony Concerning Inability of Petitioner to Meet Checks Cashed with Stout & Co.

(From examination in supplementary proceedings of December 16, 1938, R. 13, *et seq.*, Government's Exhibit 95):

14 Q. Is it a fact that you have been subsisting entirely on moneys sent you by your father? A. Of late, yes.

14 Q. When you say of late, what period of time does that cover? A. Within the last year and a half.

14 Q. Would it include the entire period when you were a resident at the Essex House and Navarro Hotel? A. No, because I was making money up until two years ago.

* * *

15 Q. Do you maintain in your own name any brokerage account at the present time in any brokerage house whatsoever? A. No.

(From examination in supplementary proceedings of July 20, 1939, R. 16, *et seq.*, Government's Exhibit 95):

19 Q. When was the last time that you got money of any kind from anybody? About how long ago? A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

19 Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year? A. Outside of help.

19 Q. What help did you get? When and from whom? A. Most of my help was from different members of my family.

(From examination in supplementary proceedings of October 26, 1938, R. 21, *et seq.*, Government's Exhibit 95-A):

22 Q. Have you a bank account? A. I have none.

* * *

23 Q. Do you now maintain a brokerage account in New York? A. I have none.

* * *

23 Q. What is the nature of your business? A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.

23 Q. You are what is called a fur broker? A. Right.

* * *

23 Q. Are there any moneys due from customers to you? A. Haven't been able to do any business for eight months.

25 Q. Is there anybody who owes you money? A. Nobody.

(This testimony was taken at the very time petitioner was cashing checks with Stout & Co. in New York.)

(From examination in supplementary proceedings of September 29, 1939, R. 27, *et seq.*, Government's Exhibit 95-B):

28 Q. So that for the entire duration of this examination, which is approximately one and a half years or thereabouts that (money sent by his father) has been the sole source of your income? A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time. (Matter in parentheses ours.)

(From examination in supplementary proceedings of September 6, 1939, R. 33, *et seq.*, Government's Exhibit 101):

35 Q. Did you file an Income Tax return for 1938? A. Yes.

35 Q. What earnings did you list? A. None.

(How could the Government more clearly and prejudicially prove the petitioner's lack of means at the time he was cashing large checks with Stout & Co.?)

APPENDIX II

SECTION 338, TITLE 18, U. S. CODE

338. (CRIMINAL CODE, SECTION 215.) USING MAILS TO PROMOTE FRAUDS; COUNTERFEIT MONEY. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. §5480; Mar. 2, 1889, c. 393, §1, 25 Stat. 873; Mar. 4, 1909, c. 321, §215, 35 Stat. 1130.)

N. Y. Civil Practice Act Sec. 789:

Privilege of a debtor, party or witness upon examination.

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * * But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination. (Added by L. 1935, ch. 630, in effect Sept. 1, from former §791.)

As amended by L. 1938 ch. 108, in effect March 14, the above section reads as follows:

A debtor, party or witnes examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud * * * but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding, except on a charge or indictment for perjury committed in an examination under this article.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 23 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

JAMES MARSHALL,
SEYMOUR M. KLEIN,
Attorneys for Petitioner.

On the Brief:

HARRY L. WECHSLER,
MARVIN J. BLOCH.

INDEX

	PAGE
STATEMENT	1
THE FACTS	3
Essex House Transaction	8
Reynolds Transaction	11
APPRAISAL	12
ARGUMENT	13
The Supplementary Proceedings Examinations subsequent to March of 1938 were Incriminating and Prejudicial	14
The Supplementary Proceedings Examinations prior to March of 1938 were Inadmissible	22
The Constitutional Question	24
CONCLUSION	30

Table of Cases Cited

Amos *v.* United States, 255 U. S. 313, 316 (1921)	24
Austine *v.* People, 51 Ill. 236, 239 (1869)	24
Burdeau *v.* McDowell, 256 U. S. 465	28
Caudle *v.* State, 116 Tex., Cr. 4, 33 S. W. (2) 438 (1930)	24
Commonwealth *v.* Taylor, 5 Cush. 605, 610 (Mass. 1850)	24
Couley *v.* State, 12 Mo. 462 (1849)	24
Cravens *v.* United States, 62 F. (2d) 261, 266 (C.C.A., 8th, 1932)	28
Draughn *v.* State, 76 Miss. 574 (1898)	24
Durland *v.* United States, 161 U. S. 306 (1896)	16

PAGE

Farris *v.* United States, 24 F. (2) 639 (C.C.A., 9th, 1928) 24
Fuller *v.* United States, 31 Fed. (2d) 747 (C.C.A., 2nd) 27, 28, 29

Heike *v.* United States, 227 U. S. 131, 143 20

Johnson *v.* United States, 228 U. S. 457 27

Matter of Doyle, 257 N. Y. 244, 252 23
Matter of Harris, 221 U. S. 274 ..... 27-28, 29

Nash *v.* United States, 229 U. S. 373 (1913) 16
Newfield *v.* Ryan, 91 F. (2d) 700, 705 (C.C.A., 5th, 1937) 28

People *v.* Carlson, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927) 23
People *v.* Defore, 242 N. Y. 13 (1926), at p. 27 28
People *v.* Humphries, 226 App. Div. 500, 503 (1st Dept. 1929) 19
People *v.* Nibur, 228 App. Div. 233, 234 (1st Dept. 1933) 19
People ex rel. Bekoris *v.* Truesdell, 259 App. Div. 1091 (2nd Dept., 1940) 15
People ex rel. Coyle *v.* Truesdell, 259 App. Div. 282, 284 (2nd Dept., 1940) 21

Regina *v.* Erdheim, 2 Q. B. 260 (1896) 25
Regina *v.* Scott, Dearsly & Bell's Crown Cases 47 25

Schenck *v.* United States, 249 U. S. 47 28
State *v.* Dena, 28 N. M. 479 (1923) 24
State *v.* Hunter, 181 Mo. 316, 336 (1904) 24
State *v.* White, 316 Mo. 576 (1927) 24

United States *v.* Hoyt, 53 F. (2d) 877, 884, 885 (1931) 28
United States *v.* Murdock, 284 U. S. 141 22
United States *v.* Rembert, 284 F. 996, 998 (1922) 24
United States *v.* Slusser, 270 F. 818 (D. C., Ohio, 1921) 24
United States *v.* St. Pierre, 132 Fed. (2d) 837, at p. 842 26

PAGE

United States *v.* Weissman, 111 Fed. (2d) 260, 262 (C.C.A., 2nd, 1940) 21
U. S. *v.* Weisman, 83 Fed. (2d) 470 (C.C.A., 2nd, 1936) 19
Weiss *v.* United States, 122 F. (2) 675, at p. 681, (C.C.A., 5th, 1941), Cert. denied 314 U. S. 687 (1941) 16
Wilson *v.* United States, 162 U. S. 613 23

Constitutions and Statutes Cited

Constitution of the United States, Fifth Amendment 13, 24, 26, 28, 29, 30
Constitution of the United States, Fourth Amendment 26
Act of February 25th, 1868, 15 Stat. 37 (R. S. 860), repealed by Act of May 7, 1910, c. 216, 36 Stat. 352 29
New York Civil Practice Act, Section 789 23
New York Consolidated Laws (Cahill), C. 41, Sections 921, 925, 932, 938 20
New York Penal Law, Section 1292A 20
New York 1943 Session Laws, Ch. 335 23

Authorities Cited

Usher, *The Rise and Fall of the High Commission* (1913), at page 125, *et seq.* 26
Wigmore on *Evidence* (Third Edition, 1940)
Section 2252, footnote 3 25
Section 2260 25
Section 2264, pp. 368-9 26
Section 2281, footnote 11 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The brief in opposition for the United States contains a rather lengthy alleged summary of the evidence developed at the trial. It justifies such departure from the issue of this appeal, which has been narrowly limited to the question of the proper admission of the New York supplementary proceedings examinations, by stating that it is necessary to set forth at some length the nature of the charges against the petitioner and the evidence adduced in support thereof in order to appraise the petitioner's contention in the light of the relation of the challenged testimony to the case.*

*Government's Brief, page 4.

The petitioner's main brief attempted to confine itself to the issue of law upon which the writ was granted and therefore did not treat of the facts of the case at any length.

As one reads the statement of facts which the Government presents as an alleged summary of the evidence one is led to wonder how any judge in the Circuit Court of Appeals could possibly, after some eighteen weeks' study of the record, have stated:*

> "'I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial.''

and again:

> ". . . I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail."

If, as the Government contends, a consideration of this case requires the setting forth at some length of the evidence adduced in support of the charges against the petitioner, the record will show that a full and fair statement of the facts has not been presented to this Court in the Government's brief in opposition.

---

* Minority opinion R 56, 58.

The present printed record is in greatly abbreviated form. However, nine copies of the printed record in the Circuit Court of Appeals were supplied to this Court in connection with the petition for certiorari. That record, pursuant to the order, allowing the writ, is to be treated as though filed in response to the writ. By virtue of a stipulation between the petitioner and the Solicitor General, filed in this Court, reference to this record is permitted. In our references the present abbreviated record is designated as "R" whereas the record filed in behalf of petitioner's application for the writ is designated "CR".

The Facts

The petitioner had been a commission agent for many years (CR 1580). For a time he had been connected with the fur business and later with various Stock Exchange houses. He secured customers for furs upon a commission basis. His services and favors were also sought by stock brokerage firms which, because of petitioner's connections with moneyed interests, were most anxious to secure the lucrative business which he controlled (CR 728-0, 738, 746, 930-2).

At the trial a very substantial portion of the Government's testimony consisted of an attempt to prove the defrauding of one of those New York Stock Exchange firms, Stout & Co.,* whose partners were Messrs. Arthur Goetz and W. Hutton Miller.** These men, through their firm, had cashed for petitioner numerous checks drawn on the J. Feldman account at Petoskey, Michigan (CR 746). In most instances, the funds to cover the checks issued were obtained by the cashing of other checks with the same firm and wiring the proceeds to Petoskey, Michigan, for deposit. Petitioner was known to be a large business getter (CR 728). He had secured for the firm of Munds, Winslow & Potter, a prominent Stock Exchange firm, commissions as high as $150,000 in a period of some fifteen months (CR 1309). This was during the year preceding petitioner's association with Stout & Co., whose partners were well aware of his business-getting capabilities (CR 746, 930-2, 949). Among some of petitioner's accounts

---

* Stout & Co. was named as a victim and as part of the alleged scheme to defraud in the bill of particulars furnished by the Government to petitioner prior to trial (CR 14z). Any contention that Stout & Co. is not a part and a main part of the alleged scheme to defraud should be viewed in the light of this state of the record.

** Referred to hereafter as Hutton Miller.

were those of Fred and Larry Fisher, millionaire financiers and executives of General Motors (CR 931, 1307-8).

Included in the services to be rendered by Stout & Co. to petitioner in return for his obtaining business was the cashing of the checks in question and the advancing of money to him (CR 740, 747, 749, 842). Direct payment of commissions would have been a violation of Stock Exchange rules (CR 741, 1387). Petitioner was unable to become a customer's man and receive commissions directly, in accordance with the rules, because he had judgments outstanding against him and the necessary approval of the Stock Exchange was thus quite unlikely. This was also the reason why petitioner did not have his own bank account but used his father's account. These facts were freely disclosed to Stout & Co. (CR 841-2).

It was then the practice of Stock Exchange firms to take temporary quarters in Florida during the winter season for the purpose of transacting business, mainly with the purpose of making permanent contacts and cementing relationships with old customers (CR 1310-11). For example, petitioner had been active in Florida on behalf of Munds, Winslow & Potter, a New York Stock Exchange firm, during the winter season of 1937-1938. After discussions between petitioner and the partners of Stout & Co. in the fall of 1938, they decided that petitioner would similarly act for Stout & Co. during the winter season of 1938-1939 (CR 949-951).

At Stout & Co.'s request, petitioner arranged for stock brokerage facilities at Miami Beach, consisting of three separate apartments on the boardwalk (CR 952). One was used as the main brokerage office of Stout & Co.; another, adjoining, but with a separate entrance, was used as petitioner's private apartment and as an exclusive suite for certain selected, important customers who did

not wish to transact their business in the main office (CR 938, 1432-1438). In these private quarters Stout & Co. installed a Translux (a modern projectionlike ticker tape arrangement) (CR 787, 935). There was an interconnecting telephone system direct to the main office next door for placing orders and obtaining market reports. Meals were prepared by a cook engaged by Stout & Co. and served to these special customers (CR 955, 1436). Petitioner was supplied with a car and chauffeur by Stout & Co., in addition to his room and board (CR 955, 1436, 1439). The third apartment, above the offices, was occupied by Hutton Miller and his wife during the winter season (CR 1433). Hutton Miller acted as the resident-partner of Stout & Co. in Florida for the winter season and petitioner's activities were under his direction.

When petitioner first became connected with Stout & Co. in New York (prior to the Florida season), his business was handled through a branch office at the Hotel Pierre (CR 747). A bank account was maintained by Stout & Co. at the branch of the Bank of New York near the Pierre Hotel, mainly for the accommodation of petitioner in the cashing of his checks (CR 740, 928). After a time, petitioner's business was transferred to the main office where it was handled directly by the partners, Messrs. Goetz and Miller. (CR 748, 784). About November of 1938, the advances of Stout & Co. to petitioner through the cashing of checks had reached the amount of some $12,000. Stout & Co. then paid petitioner $12,000 so that the outstanding checks could be cleared (CR 784-5).

The check-cashing accommodation continued after that payment (CR 785). By the end of December, the amount advanced to petitioner had again reached a sub-

stantial sum (CR 786). Petitioner then went to Miami Beach to participate in Stout & Co.'s winter business season (CR 785). He left with Arthur Goetz, senior partner of Stout & Co., a batch of checks signed in blank by J. Feldman, payable to the order of Sam Feldman, and endorsed by him. Goetz, from time to time, in New York City, in petitioner's absence, filled in amounts and dates, cashed the checks and wired the money forward to Petoskey, Michigan, for deposit to cover checks petitioner had previously issued and which had not yet cleared. Goetz wired forward almost every day the sum of $6,000, after having first filled in and cashed Feldman checks in that amount (CR 795-9) and Stout & Co. paid the Western Union charges for this service.

After petitioner had been in Florida some time, Stout & Co. wired sufficient funds to him in Miami to cover the checks cashed in New York, and then en route to Michigan (CR 785). Petitioner wired this money from Florida to Michigan and further check cashing was then handled directly by petitioner and the Stout partner, Hutton Miller, at Miami (CR 795, 785). The advances during petitioner's association with Stout & Co. had reached $36,000 by this time (CR 794). Inasmuch as petitioner had and could have no official connection with Stout & Co., it was then arranged that he give Stout & Co. a note for $36,000, payable to the father of Hutton Miller, one Royal Miller, who had no connection with the transaction at all (CR 969). Obviously the matter was handled in this manner so that the firm's name would be kept out of it.

While petitioner was in Florida, he would give the checks to Dornbach, the chauffeur (CR 1446-7), to take to the resident partner, Hutton Miller, for the Stout & Co. endorsement. Dornbach would then cash the checks at the Miami Beach Bank where Stout & Co. had its account

(CR 1441-3). At times the entire proceeds of the checks would be wired forward to Petoskey, Michigan, and, at other times, only part would be wired and the balance returned to petitioner in cash. Hutton Miller was fully aware of the exact nature and purpose of the check cashing (CR 1421-3).

After petitioner returned to New York, a few days before the Stout & Co. office closed for the season, there was outstanding and en route to Michigan a substantial amount of checks to be covered. For this purpose, petitioner left checks signed in blank with the Stout & Co. Miami office (CR 1445-6). The resident partner, Miller, and the manager, Landau, filled in the amounts and wired the money to Michigan in petitioner's absence (CR 1440-45). On one occasion, because of the large amount involved, the Miami Bank refused to cash petitioner's check. However, Miller and Landau with the bank's consent, arranged to effect the same result by cashing two checks aggregating the amount represented by the first check (CR 1444-5).

Goetz, the partner who had remained in New York, later used threats to force Miller personally to assume the resulting loss to the firm in order that the Stock Exchange might not become aware of the firm's activities (CR 923-5). Despite this precaution, an investigation was subsequently conducted by a committee of the Stock Exchange (CR 934-5). During the course of this investigation, the committee found that petitioner enjoyed many unusual services from Stout & Co., including the check-cashing privileges. Both Goetz and Miller were severely censured. The language used by the committee is direct refutation of the Government's theory, viz., that Stout & Co. was a victim (CR 958), for the committee, saying that more serious action

was not taken because the public had not been hurt in any way, added:

> "The Committee wishes to make it very clear to you, Mr. Miller, that they consider the practice that you allowed to go on in your office to be, to say the least, most reprehensible. This is the sort of practice that we will not tolerate and we mean to stop it." (CR 957-8)

From the testimony of the Government's own witnesses therefore, it is apparent that petitioner's check cashing activities were part of a business arrangement with Stout & Co. That firm's full knowledge and awareness, as well as its active, knowing participation in the transaction for their own business ends, remove from these transactions any semblance of fraud as to this alleged victim.

Essex House Transaction

The rest of the Government's case of an alleged scheme to defraud consisted of another incident commencing in January, 1937 and ending in August, 1937. This transaction bore no relationship to the Stout & Co. matter, and, in fact, occurred well over a year prior thereto.

In the Essex House transactions, the Government's statement of facts would convey the impression that petitioner, a stranger, sauntered up to the desk of the hotel, cashed a large check and then continued almost daily to cash his checks there until, over a period of a few months, he received some $800,000 thereby. It is apparent that the underlying basis of the dealings between the petitioner and Essex House has been omitted from the Government's statement. In 1937, petitioner was a tenant at the Essex House (CR 520). Obviously neither petitioner nor any other guest could have cashed checks in the

amount of $800,000 at the hotel over a period of seven months if the relationship existing between the hotel and the defendant were merely that of innkeeper and guest.

The cashing of the checks occurred with the consent of the hotel's credit manager, who was not charged in any way with being an accomplice; he was personally familiar with the petitioner's practice of wiring money forward to cover checks previously cashed (CR 459-460). Petitioner had done business favors for the Essex House and was, in fact, personally friendly with and had made check cashing arrangements with its operating trustee (CR 556-557). The management, at the very time of the check cashing, was fully aware of petitioner's poor financial condition (CR 626-8, 632-3). The top ranking officials of the Essex House were not unaware of the purpose for which the checks were being cashed by petitioner (CR 508, 556-7). Even Western Union knew that petitioner's checks were being cashed to provide funds to cover previously cashed checks (CR 377). The Government's witness Erb (alleged to be a victim) himself wired forward money to meet such checks and signed the petitioner's name to the money orders (CR 401). Most significant is the fact that the impressed fund maintained by the Essex House for the purpose of cashing checks of guests was $7,000 higher than generally required for its normal purpose—this, in order to accommodate the defendant (CR 1281-2).

It is not surprising therefore, that Judge Clark, in his dissent below, stated that affirmative evidence of knowledge of the alleged victims was strong and then wrote:

> "Certainly agents of the Essex House had it (knowledge) and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the sizeable amounts of these daily transactions." (Matter in parenthesis ours.) (R 56-57)

The Government, in its brief in opposition to the application for the writ herein, tried to have it appear that the "discovery" by the Essex House of the petitioner's check "kiting" activities occurred in August, 1937, and that, thereupon, they stopped the further cashing of checks. Petitioner pointed out in his reply brief that such a claim was misleading, and the Government in its present brief no longer makes such claim. The Government had no choice but to abandon this allegation for the record clearly indicates that, before and throughout the entire period of time that Essex House was cashing the petitioner's checks, it was the holder of an unsatisfied and uncollected judgment against the petitioner for room rent and services, and that it had been unsuccessful in its attempt to collect from the petitioner even that small judgment (CR 626-640). The fact is that the Essex House refused to continue the accommodation of check cashing to the petitioner only after there had been a change in ownership and management (CR 492). At that time the petitioner was requested to take care of the outstanding checks, which he did, and the Essex House did not incur any loss in these transactions (CR 500).

In brief, the record is replete with testimony adduced by the Government itself that there was not the slightest effort by the petitioner to conceal his intent and purpose from any one connected with Essex House. In fact, the Government's evidence affirmatively shows that Essex House, through its credit manager, its operating trustee and everybody in authority, willingly and knowingly participated in and aided the "kite" by cashing additional checks and wiring forward moneys to meet checks which they had previously cashed.

Reynolds Transaction

At the trial, the Government tried to establish an alleged fraud in the borrowing in 1937 from one Edwin S. Reynolds, Jr., of $32,000. The Government's position, apparently, is that there was fraud involved inasmuch as Reynolds had sent petitioner checks in blank drawn on Reynolds' bank account and petitioner had, after filling in the amounts, cashed the checks. Reynolds was named as a victim and was not in any way indicated to be an accomplice (R 5-7; CR 14z). Petitioner had cashed these checks with Reynolds' knowledge and consent (CR 1318-20). Petitioner believed Reynolds, the president of a prominent mid-western corporation, to be a wealthy man who dabbled in the market as a diversion and lived in luxurious fashion (CR 597, 1315-1316).

The return of the Reynolds checks for lack of funds came as a surprise to Feldman. In fact, before Reynolds' checks were cashed for petitioner by the stock brokerage firm of Munds, Winslow & Potter, Mr. Allen, its managing partner, communicated with Reynolds at Dayton, Ohio (CR 1318-20). Reynolds was informed of the amount of the checks and was told that petitioner was to be given the cash (CR 1318-20). The transaction was not completed until Reynolds had said it was all right to go ahead (CR 1319). Feldman gave two promissory notes to cover the money advanced by Reynolds (Exhibits 86 and N; CR 1850-1; 1624-5). One note for $12,000 was subsequently paid by petitioner who received the note back (CR 1410-1), and payments were made on the other note (CR 1414-6). Although petitioner was alleged to have defrauded Reynolds, the proof showed that petitioner and Reynolds remained warm friends to the time of Reynolds' death and petitioner was regarded as one of Reynolds'

closest intimates (CR 1414, 1416-7). Reynolds himself, as opposed to the Government's contention of fraud, had stated on occasion that the entire transaction was a loan (CR 1414).

With respect to the Reynolds transaction, Judge Clark stated:

> "As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in, and Reynolds naively complied. What would he have signed the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps, here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important." (R 57)

The record is abundantly clear that the Reynolds transaction involved no fraud of any kind. It was merely the case of an advance of money to help out a friend. That this attempt created hardship for the volunteer certainly did not make the petitioner's conduct fraudulent.

Appraisal

If this Court is to appraise the petitioner's contention of reversible error by virtue of the admission of the many supplementary proceedings examinations of the petitioner in the State of New York in the light of the evidence adduced at the trial, it becomes apparent that an analysis of the testimony adequately justifies the doubts of the dissenting Judge below as to whether there was any defrauding at all or even an intent to defraud (R 58). At any rate, by virtue of that status of the record, it is not surprising

that one judge of the Circuit Court below cautioned as to the extreme care that was needed in order to insure a fair trial (R 56), and the contention of reversible error must be viewed in the light of that situation.

Argument

The spectre of *stare decisis* to which the petitioner referred in his main brief (p. 29) as hovering over the parties in the case, as well as over the courts which have considered it, apparently still casts its heavy shadow upon the Government. Nowhere in the brief for the United States do we find any attempt to penetrate to the heart of the constitutional problem involved and to consider the scope and effect of the Fifth Amendment as determined by its language, its historical background and the public policy which justifies its existence. From a study of the Government's brief alone, one would almost be forced to conclude that the privilege against self-incrimination portion of the Constitution sprang from nowhere, without paternity and without reason. The Solicitor General has not seen fit even to dignify by reference the decades of struggle and tribulation in England and America which finally gave birth to the privilege of self-incrimination and to its inclusion among the first ten amendments to the United States Constitution.

Moreover, well over half of the brief of the United States is devoted to an earnest and determined effort to persuade this Court to avoid any ruling on the basic constitutional question herein involved. It urges that the decision below must be affirmed because the objectionable evidence, admitted in violation of the petitioner's constitutional rights, was non-incriminating, cumulative and non-prejudicial. One may well question the assumed confidence

of the Solicitor General in the strength of his position when he finally, near the end of the brief, does discuss the real question involved, in view of his determined effort to avoid any consideration of that problem.

The Solicitor General again has, just as in opposing the application for a writ, abandoned the previous reasoning advanced by the United States Attorney below and by the majority of the Circuit Court of Appeals below. While the Solicitor General eagerly accepts the result, he is quick to reject the reasoning and attempts to justify it in other ways. For the purposes of his argument, he divides the supplementary proceedings in question into those taken prior to March of 1938 and those subsequent to March of 1938 and attempts to defend the admission of each group separately.

The Supplementary Proceedings Examinations Subsequent to March of 1938 were Incriminating and Prejudicial

With respect to the five supplementary proceedings examinations taken subsequent to March of 1938, the Government sets forth the proposition that the incriminating character of the petitioner's testimony must be determined in the light of the conditions existing at the time the testimony was given (see pp. 26-27). It is thereafter assumed that an acceptance of this axiom must result in the deterioration and ultimate collapse of the petitioner's contentions. As a matter of fact, an analysis of the record in the case at bar conclusively shows that, applying that particular test to the supplementary proceedings examinations taken after March of 1938, there can be no question that they were highly incriminating, inflammatory and prejudicial.

It is not intended to discuss here all of the cases cited by the Government at pages 27 to 28 of its brief in footnotes 30 and 31, wherein the tests of when testimony be-

comes "incriminating" are discussed. In petitioner's main brief (p. 22), the rules as to "incriminating" testimony are sufficiently set forth to obviate their repetition herein. However, petitioner is unable to proceed with an analysis of the facts and a consideration of the axiom contended for by the Government without calling the attention of this Court, in passing, to the case of *People ex rel. Bekoris v. Truesdell,* 259 App. Div. 1091 (2nd Dept., 1940) (cited in footnote 31 of the Government's brief). In that case, the New York court held that the examination of a defendant before a Grand Jury and the elicitation from him of his *name* and *address* did not constitute sufficient incrimination to warrant the immunity statute coming into play. If the type of evidence adduced in the supplementary proceedings in the case at bar be of the type of the testimony in the *Bekoris Case,* it would indeed be wasteful and futile for this petitioner to proceed any further; and, likewise, if the Government must rely on cases of that type for precedent in the instant case, they must indeed be sorely put to sustain their position.

A very substantial portion of the prosecution's proof at the trial of the case at bar consisted of transactions of the petitioner with the stock brokerage firm, Stout & Company, from September 1938 to April 1939. Stout & Company was named as a victim in the bill of particulars (CR 14z). Nevertheless, the Solicitor General seeks to find comfort in arguing that, since the mailings alleged in the indictment occurred in 1937, the Stout testimony was not actually part of the crime charged, but went to the question of the petitioner's intent to defraud (see p. 32, Government's brief). However, the United States Attorney in the trial court below, on summation, admitted that Stout & Company was a victim of the very scheme charged in the indictment (CR 1467-8). The prosecutor also asserted

that Stout & Company was one of the few victims as to whom evidence had been offered at the trial (CR 1501). Besides, it is not necessary that there be a mailing for each and every part of a scheme to defraud; it is sufficient that there be at least one or more mailings in furtherance of that one scheme.* Finally, whether it be part of the scheme to defraud or a similar offense to show intent, the Stout testimony comprised approximately 300 pages of the record (CR 712-984; 1012-1026; 1030-1033) and involved the alleged kiting of some $600,000 worth of checks,** which resulted in a loss of $81,500 to Stout & Company.*** The prosecutor dwelled upon the Stout & Company situation in summation (CR 1467-68) and the trial court, in its charge to the jury, singled it out for specific comment (CR 1483-84). Under those circumstances, if error occurred with reference to the Stout & Company proof, it cannot be lightly brushed aside at this date.****

In that portion of the case dealing with Stout & Co., the prosecution undertook to prove that the petitioner cashed checks in New York and Florida drawn on the

---

* "The theory upon which the indictment in the court below was drawn was that there was but one scheme, which was to obtain money by fraud in connection with the building contract. . . . The fact that the mails were employed in executing a part of the scheme immediately after it was devised and at various times before the entire scheme was completely devised is no defense under the statute." *Weiss* v. *United States*, 122 F. (2d) 675, at p. 681 (C.C.A., 5th, 1941), cert. denied, 314 U. S. 687 (1941); see also *Durland* v. *United States*, 161 U. S. 306 (1896), at p. 315; Cf. *Nash* v. *United States*, 229 U. S. 373 (1913).

** This information appears in Exhibit 103 which was not printed in the record of the Circuit Court filed with this Court in behalf of the application for a writ of certiorari, but was filed separately by photostatic copy with the duly certified transcript of the proceedings below which accompanied the petition and which, under the order allowing the certiorari and the stipulation filed between the parties, may be referred to in this review.

*** This is to be compared with no financial loss in the case of the Essex House and a financial loss of approximately $20,000. in the case of Reynolds, the other two victims.

**** Especially is this so in view of Judge Clark's dissent in the Circuit Court below in which he expressed his doubt as to the guilt of the defendant, and therefore cautioned as to the extreme care that should be exercised with reference to possible errors (R 56-57).

Petoskey Bank in Michigan, subsequently covered them by cashing additional checks and wired the funds received from the later checks to the Petoskey Bank to cover the earlier checks and that, at the time the checks were being cashed by the petitioner, he was without funds or power to pay or meet them.

The proof of the financial condition of the petitioner at the time of the cashing of the checks was most important on the question of fraud. A specific allegation in the indictment was directed to a lack of funds or power to meet the checks cashed (R 2).* The majority opinion in the Circuit Court below emphasized the fact that the cashing of checks becomes a scheme to defraud "when the maker knows that he has no prospect of paying the checks" (R 47). Again later, the majority stressed the fact that checks were presented to be cashed, petitioner knowing that he did not have the financial means to pay them (R 47).

The supplementary proceedings examinations subsequent to March of 1938 were used to prove, among other things, this vitally important fraud requirement that, at the time the petitioner was presenting checks to Stout & Co. for cashing, he was without funds or power to meet them. Thus, in the examination of the petitioner taken under oath on October 6, 1938 by virtue of subpoena petitioner testified that he had no bank account (R 22), no brokerage account (R 23), no customers' accounts (R 23), no money due from customers (R 23), employed no one either at home or in business (R 25), had no charge accounts (R 26), owned no automobile (R 25), was owed

* Paragraph "(3)" of the indictment alleged that the defendant would cash checks by presenting them to the Essex House "and to others to the grand jurors unknown" (R 2). A bill of particulars thereafter identified Stout & Co. as one of those who cashed checks for the petitioner and thereby became a victim of the scheme (CR 14cc-dd, 14n and 14z).

money by no one (R 25), was in arrears on his rent (R 26), and that, when rent was paid, his father paid it (R 22). Yet during this very period of time, the petitioner was cashing hundreds of thousands of dollars worth of checks with Stout & Co.*

In the supplementary proceedings examinations taken on December 16, 1938, the petitioner testified under oath that he had been subsisting on moneys sent by his father (R 14), that he had no brokerage account and had not had one for years (R 15-16), and that, between his previous examination in October 1938 and the examination in December, he had only $25. or $50. to live on, which he had gotten from his father (R 16). At that very time, the petitioner was cashing checks with Stout & Co. at the rate of $6,000. a day.**

During the period from September 1938 to April 1939, the petitioner steadily presented checks to Stout & Co. for cashing, totalling almost $600,000. Further supplementary proceedings examinations subsequent to March 1938,*** admitted in evidence in the court below, showed that he had been unemployed for many years (R 33); had no place of business (R 33); was owed no money by anyone (R 35), had no source of income from October 1938 to September 1939 except borrowings from his father (R 28)****; had no brokerage account for over two years (R 29); had no safe deposit box (R 30); had bought no clothes for two years and those last bought had been paid for by his father (R 28); and that, in his income tax return for 1938, he listed no earnings (R 35). Thus,

---

* See Exhibit 103, referred to in second footnote on p. 16, *supra*.

** See pages 31-32 of Exhibit 103.

*** Those of July 20, September 6 and September 29, 1939 (R 16-21, 27-31, 33-35).

**** At another point in the record, it was shown that his father himself was overdrawn (CR 1205) and was financially unreliable (CR 74).

through the petitioner's sworn testimony in supplementary proceedings taken after March of 1938, the Government endeavored to prove a vital part of the Stout & Co. fraud, the lack of funds and power in 1938 and 1939 to meet the checks presented to them to be cashed.* The judge and prosecutor in the trial court justified the admission of the testimony on the ground that it went to the petitioner's financial condition during that period (CR 1236-7, 1241).

Moreover, the supplementary proceedings examinations subsequent to 1938 were used to show that money was wired forward for deposit in the Petoskey Bank account (R 30) and that checks from that account were being *mailed* from Michigan to New York during the Stout & Co. period (R 24, 29).** Finally, these examinations subsequent to March of 1938 were employed to show the petitioner's relations with Stout & Co. in Florida (R 16-19), during which sojourn he continued his check cashing activities with them.***

Thus, there was wrung from the petitioner's lips in the various supplementary proceedings examinations in 1938 and 1939 admissions that he was receiving checks, cashing checks, wiring the funds forward, all this at a time when he was without funds or power to meet or pay them. These supplementary proceedings were conducted during and

* If the petitioner had had power or funds to meet the checks, there would have been no fraud (Cf. *People v. Nibur*, 228 App. Div. 233, 234 (1st Dept., 1933); *People v. Humphries*, 226 App. Div. 500, 503 (1st Dept., 1929)).

** Thus, even the element of mailing was contained in the supplementary proceedings examinations admissions. Furthermore, the depositing or cashing of the Michigan checks in New York resulted in their being forwarded by mail by the New York banks to Michigan for clearance. This mailing alone was sufficient to bring the petitioner within the scope of the mail fraud statute (see *U. S. v. Weisman*, 83 Fed. (2d) 470 (C.C.A., 2nd Cir., 1936)). Certainly, the incriminating nature of that evidence when given can hardly be doubted.

*** In answer to an objection to the admission of this evidence, the United States Attorney specifically offered it as admissions of the facts (CR 1272).

with reference to a period of time when the petitioner was actively, allegedly "kiting" some $600,000 worth of checks with Stout & Co.* Upon the Government's own axiom that the test of the incriminating nature of the compulsory testimony must be considered as of the time that it was given, there can be no question that those supplementary proceedings examinations were highly incriminating.**

Some allusion was made in the Government's brief, at page 19, to the effect that nothing in the case showed any reasonable ground for apprehension by petitioner at the time of his examinations of the institution of a criminal proceeding. The Government has evidently overlooked the fact that the record clearly shows that an agent of the Federal Bureau of Investigation of the Department of Justice was investigating the matter in July of 1939 (CR 1213) and that other agents of that same Department had commenced the investigation even prior to that time (CR 1150). That investigation specifically covered the Stout transactions as well as others. Moreover, the danger of state prosecution by reason of petitioner's check "kiting" activities clearly appeared even earlier (CR 592).

Thus, paraphrasing the test laid down by the Government in its own brief at page 19, it is clear that the sup-

* In view of the nature of the testimony extracted from the petitioner in the supplementary proceedings examinations subsequent to March of 1938, the recourse of the Government to the case of *Heike* v. *United States*, 227 U. S. 131 (pp. 26-27, Government Brief), as authority for an allegation that the present testimony was non-incriminating becomes palpably untenable upon comparison of the facts in the two situations. In the opinion in the *Heike* case, it was stated ". . . the evidence given in the former proceeding did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it . . ." (p. 143). The supplementary proceedings examinations subsequent to March of 1938 were admitted in the trial court below to convict the petitioner; they were important and prejudicial evidence and were obviously incriminating *when given* in the light of the "kiting" situation that existed at that very time.

** Not only did they incriminate the petitioner under the mail fraud statute, but they equally incriminated him under the criminal statutes of the State of New York as set forth in New York Consolidated Laws (Cahill) C. 41, Sections 921, 925, 932, 938 and New York Penal Law, Section 1292(a).

plementary proceedings examinations subsequent to March of 1938 involved admissions of the commission of criminal offenses against both the State and Federal Governments and provided vital "elements"* and "links"** in the proof thereof. Although it is doubtful that the added requirement of apprehension of a criminal proceeding is necessary in order to furnish a witness the protection of the constitutional privilege, even that was present in this case.

It is further clear from petitioner's main brief, as well as from the facts hereinabove stated, that the testimony subsequent to March of 1938 was not cumulative and non-prejudicial. The Stout transactions in 1938-1939 (the "kiting" of checks at a time when petitioner had no funds or power to meet them) were clearly crimes under the New York State law and were obviously part of the scheme alleged in the subsequent federal mail fraud indictment. The supplementary proceedings testimony of 1938-1939 was highly relevant and essential as to those transactions. On the other hand, the 1936-1937 supplementary proceedings testimony pertained to the Essex House and Reynolds situation (1937) and not to petitioner's financial condition and actions one and one-half to two years later, to wit, when he gave his 1938-1939 testimony. Furthermore, the earlier testimony obviously could not and did not concern petitioner's actions in the Stout transactions in 1938-1939. There can, therefore, be no question but that the supplementary proceedings examinations subsequent to March of 1938 were not cumulative and their admission was, in fact, prejudicial.

---

* *United States* v. *Weissman*, 111 Fed. (2d) 260, 262 (C.C.A., 2nd, 1940).

** *People ex rel. Coyle* v. *Truesdell*, 259 App. Div. 282, 284 (2nd Dept., 1940).

The Supplementary Proceedings Examinations Prior to March of 1938 Were Inadmissible

Inasmuch as petitioner has demonstrated that incriminating and prejudicial supplementary proceedings examinations subsequent to March of 1938, concededly compulsory, were admitted in evidence in violation of the petitioner's constitutional rights against self-incrimination, lengthy consideration of the Government's arguments with reference to the testimony taken prior to March of 1938 is unnecessary. Although petitioner's main brief clearly proves the inadmissibility thereof, some additional discussion may be helpful in indicating that the Government's position thereon is utterly untenable.

With respect to the testimony prior to March of 1938, the Government contends that the New York statute was defective, that petitioner, not having raised his state privilege, must be deemed to have given his testimony voluntarily. It is further claimed by the Government, at pages 12-13 of its brief, that petitioner had one privilege and that he waived it by testifying. The Government glibly glides over the logical legal hurdle that the petitioner could hardly have waived the privilege against self-incrimination under the Federal law, when, in fact, at the time that he testified in the State Court, he was unable to raise such a privilege.* The authorities presented as supporting such a doctrine of waiver are those holding that a person examined in one jurisdiction cannot refuse to testify on the ground that he might be incriminated in another jurisdiction. Those decisions do not hold that a person by so testifying waives his right to object to the

* *United States* v. *Murdock*, 284 U. S. 141. But in the federal court below, when petitioner had his first legal opportunity to object to its introduction, he did so.

use of that compulsory testimony when it is offered in that other jurisdiction.

Throughout the argument dealing with the admissibility of this testimony (pp. 13-15 of Government's brief), the alleged defectiveness of the immunity statute is stressed to such a degree that it is made to appear that it is a complete nullity. Nowhere is it mentioned,—indeed it seems to be studiously avoided—that, even prior to March of 1938, testimony in supplementary proceedings could not be used against the person so testifying.*

Wilson v. *United States*, 162 U. S. 613 (p. 14, Government's brief) and other such decisions involve waiver by voluntary testimony given where there was no statute prohibiting the testimony from being used in the future against the witness. The witness testifying under the circumstances of the *Wilson* situation did so well knowing (or at least he must in law be presumed to have known) that such testimony could be freely used against him in the future. Of course, such a witness thus waived the prohibition of the use of his testimony against him. But such a case has no application to the case at bar since here petitioner testified under the guarantee of the New York Statute that his testimony would not and could not be used against him.**

The Government contends that the testimony prior to March 1938 was "voluntary." This position is untenable. Analogy is readily available in the rules as to voluntary confessions. Confessions obtained by promises of im-

---

* *People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept. 1927); *Matter of Doyle*, 257 N. Y. 244, 252 (1931).

** *People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept. 1927). This right arose automatically by testifying and did not have to be specifically claimed. In 1943, an amendment to the Civil Practice Act, Section 789 was passed by the Legislature so that today the immunity must be specifically claimed (1943 Session Laws, ch. 335). However, that amendment does not affect the case at bar.

munity* or by promises of preferential treatment,** or even by the promise not to use the confession against the defendant in the future*** are inadmissible because they are involuntary. It can hardly be argued that testimony secured under the promise and guaranty of a statute that it will not be used against the witness in the future is any less involuntary.****

Therefore, even as to the supplementary proceedings testimony taken prior to March of 1938, the petitioner's rights under the self-incrimination clause of the Fifth Amendment were violated by their introduction in evidence in the Federal Court below.

The Constitutional Question

Having devoted the major portion of its argument to other matters, in an attempt to escape consideration of the basic legal problem presented, the Government in the final one-third of its brief, at last and reluctantly, approaches the constitutional question involved in the case at bar and upon which the writ of certiorari was granted.

Much emphasis is placed upon the alleged legal doctrine that the privilege against self-incrimination applies primarily to *present* testimonial compulsion (see p. 40, Government's brief). The emphasis which is placed upon

---

* *Austine* v. *People*, 51 Ill. 236, 239 (1869); *State* v. *Hunter*, 181 Mo. 316, 336 (1904); *Draughn* v. *State*, 76 Miss. 574 (1898).

** *Commonwealth* v. *Taylor*, 5 Cush. 605, 610 (Mass., 1850); *State* v. *White*, 316 Mo. 576 (1927); *Caudle* v. *State*, 116 Tex. Cr. 4, 33 S. W. (2) 438 (1930); *State* v. *Dena*, 28 N. M. 479 (1923).

*** *Couley* v. *State*, 12 Mo. 462 (1849).

**** Compare the case wherein it has been held that a person who does not object to an illegal search of his premises by a police officer or other law enforcing agent does not "consent" to such search and seizure so as to make it legal, but, at most, "acquiesces" or, in effect, bows to lawfully constituted authorities. *Amos* v. *United States*, 255 U. S. 313, 316 (1921); *Farris* v. *United States*, 24 F. (2) 639 (C.C.A., 9th, 1928); *United States* v. *Rembert*, 284 F. 996, 998 (1922); *United States* v. *Sussser*, 270 F. 818 (D. C., Ohio, 1921).

"present" would seem to be an unwarranted and self-serving addition to the usually accepted definition of the privilege. The citation from Wigmore's Treatise on Evidence (footnote 49) does not bear out any such limitation.

The case of *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, is treated at length (pp. 40-43), and the decision of that English Court is advanced as determinative of the proposition in the case at bar. It is contended that the *Scott* case established the proposition that incriminating testimony lawfully compelled in the first instance may thereafter be used against a party freely. The Solicitor General than argues inferentially that, since New York State could lawfully compel the petitioner to testify compulsorily by virtue of a valid immunity statute, the *Scott* decision is authority that such testimony may be used against him subsequently. It admittedly could not be used against petitioner by the People of the State of New York. The authority of *Regina* v. *Scott* for the use by the Federal Government of the examinations in the case at bar is completely and finally demolished by recognition of the fact that the *Scott* decision and others of its type abolished the privilege against self-incrimination in England in bankruptcy matters. In the words of Professor Wigmore, those decisions had driven "a coach and four through the privilege."*

The Canadian cases cited in the brief for the United States as buttressing *Regina* v. *Scott*, also fall by the wayside in the light of the fact that Canada by statute has, in effect, abolished the privilege against self-incrimination.**

---

* Wigmore *on Evidence* (3rd Ed.), Section 2260, page 357, (discussing *Regina* v. *Scott*, *supra* and *Regina* v. *Erdheim*, 2 Q. B. 260 (1896), cases cited by the Government at page 42 of its brief, footnote 52). In that same section of Wigmore it is also indicated that the statute of 1883 later expressly nullified that privilege in bankruptcy matters.

** Wigmore *on Evidence* (3d Ed.), Section 2281, footnote 11 and Section 2252, footnote 3.

It can hardly be claimed that the privilege against self-incrimination has been abolished in the United States although a ruling in the case at bar that the compulsory incriminating testimony elicited in the New York State courts may be used against the petitioner in the Federal court in a criminal case to secure his conviction will go a long way toward achieving that effect. As long as the privilege against self-incrimination remains a part of the Constitution of the United States the *use* in a Federal court of compulsory testimony, to secure the conviction and punishment of a defendant, is an obvious and gross violation of that privilege.*

The cases cited in footnote 53, page 43, of the Government's brief, arose out of an illegal search and seizure under the Fourth Amendment. The latter has a background and history different from that of the Fifth Amendment involved in the case at bar**. Furthermore, in the illegal search and seizure cases, the defendant remains passive and the constable blunders. It was the reluctance of this Court to permit the blunder of an official of another jurisdiction to penalize the federal prosecution that resulted in the decisions cited by the Government. Moreover, books, records, papers and con-

---

* It has been pointed out many times that the root of the privilege sprang from the objection to convicting and punishing persons by the use of their compulsory testimony. See Frank, J., in *United States v. St. Pierre*, 132 Fed. (2d) 837, at p. 842, wherein he stated: ". . . the danger of punishment is at the heart of the privilege." And again: "The Puritans, who insisted that the oath ex officio was unlawful, considered it no disgrace to commit the crime of heresy; they were proud of their heresy; if, without fear of punishment, they could have confessed to what the law denounced as heretical acts, they would have been glad to do so. What they sought to avoid in their attacks on the procedure of the High Commission was punishment for violation of a substantive law which they considered abhorrent." See also Usher, *The Rise and Fall of the High Commission* (1913) at page 125, *et seq.*

** 8 Wigmore *on Evidence* (3d Ed.), Section 2264, pp. 368-9.

traband* are not testimonial in nature, although they may be evidentiary.

Thus we find that, in the illegal search and seizure cases, the defendant remains passive; the evidence obtained is not "testimonial." In the case at bar, however, petitioner was compelled to communicate his guilt affirmatively and in testimony given in court. It is a far cry to assert that the decision in the one case is determinative of the other. The present case could not present a clearer picture of a person compelled to be a "witness against himself."

The Government stresses the decision in *Fuller* v. *United States*, 31 Fed. (2d) 747 (C.C.A., 2nd) referred to at pages 36-40 of Government brief. That case involved the admission into evidence in a criminal case in the Federal court of books and records of the defendant theretofore obtained by the United States Government on subpoena from the Attorney General of the State of New York in whose possession they were. The Government, in the case at bar, contends that the *Fuller* decision is a direct holding in its favor in the present case. *Fuller* v. *United States* was, in fact, decided by the Circuit Court of Appeals of the Second Circuit and the case at bar arises under a writ to that same circuit. Nevertheless, neither the United States Attorney below nor the majority** nor minority of the Circuit Court below regarded its relevance and importance as sufficient to cite it. The *Fuller* decision simply falls within that class of cases represented by *Johnson* v. *United States*, 228 U. S. 457, and *Matter of*

* The case at bar, however, is that type of case where "testimony" in Court is obtained compulsorily by torture, force, coercion (or threat thereof) or by compulsory oath and that "testimony", incriminating the defendant, is used subsequently to secure his conviction.

** The Judge who wrote the majority opinion in the Circuit Court was a member of the very bench that decided the *Fuller* case.

Harris, 221 U. S. 274, and others cited by the Government at page 40 of its brief involving books and records whose lawful custody or title has passed to one other than the defendant. It is so cited by the numerous courts that have relied upon its authority.* The Court in the *Fuller* case devoted one short paragraph to its decision on this point and merely cited as authority the books and records cases.**

Besides, the books and records in the *Fuller* case were introduced at the trial in the federal court through a witness who identified them. Books and records are not testimony although they may be evidentiary. Wherein then lies the testimonial compulsion required for protection under the Fifth Amendment?*** But in the case at bar, can it be said that the examinations of the petitioner in the supplementary proceedings, taken under oath in the courts of the State of New York and admitted in the court below, were not *testimonial?* Certainly they did not become any less "testimonial" because they had been reduced to written form and were thus admitted into evidence in the court below. The Circuit Court of Appeals in the case at bar took some eighteen weeks to decide the

---

* *Cravens* v. *United States*, 62 F. (2d) 261, 266 (C.C.A., 8th, 1932); *United States* v. *Hoyt*, 53 F. (2d) 877, 884, 885 (1931); *Newfield* v. *Ryan*, 91 F. (2d) 700, 705 (C.C.A., 5th, 1937). The Government in its brief in this court makes mention of the fact that there was an immunity statute present in the *Fuller* case. It does not mention, however, that the immunity statute in such case, unlike the one in the case at bar, required the witness affirmatively to claim his immunity, failing which the same would be waived (*General Business Law of the State of New York, Section 359*; see *Dunham* v. *Ottinger*, 243 N. Y. 423 at pp. 430-431). Further than that, the Circuit Court in deciding the *Fuller* case made no mention of, and gave no consideration to, the Immunity Statute or its effect.

** Note that the court also cited *Burdeau* v. *McDowell*, 256 U. S. 465, an illegal search and seizure case involving no testimonial compulsion and *Schenck* v. *United States*, 249 U. S. 47, which involved the seizure of documentary evidence upon a search warrant. Thus, the only cases cited for authority are books and records cases.

*** *People* v. *Defore*, 242 N. Y. 13 (1926), at p. 27. The Government cites this case with approval in its brief at pages 37 and 40.

instant case, admitted the lack of precise authority on the point and was evidently so unimpressed by the relevance and weight of its own prior decision in *Fuller* v. *United States* in relation to the problem of the case at bar that it did not even dignify its earlier decision by citing it.

Finally, it is difficult to understand how the Statute of 1868 (repealed in 1910), referred to at page 44 of Solicitor-General's brief, which was so broad in scope that it purported to prevent the subsequent use in *any* court of the United States of any testimony or *pleadings* previously given by a party or witness, whether incriminating or *non-incriminating*, can have any bearing on the question of whether the introduction of incriminating testimony secured compulsorily in the State of New York and thereafter offered in evidence in the Federal Court was a violation of the privilege against self-incrimination as set out in the Fifth Amendment to the United States Constitution. The history of that statute, its purpose and the reason for its repeal may be interesting, but its bearing upon the case at bar or upon the constitutional amendment remains obscure. Certainly its repeal cannot be determinative of the case at bar.

The Government, in its effort to convince this Court that there was no violation of the Fifth Amendment, has gone so far afield as to consider the possible effect of a statute repealed in 1910 and has strained, throughout its brief, to find precedents by analogy which, as pointed out above, do not apply. On the other hand, the Government has completely ignored any direct consideration of the Fifth Amendment itself and of its history and the morality

---

*Cf. *Matter of Harris*, 221 U. S. 274. Moreover, in the petitioner's main brief at pages 26-29, he has already discussed that type of case cited by the Government at pages 48-51 of Government's brief involving reports as well as books and records.

and public policy involved in its enactment and enforcement. That Fifth Amendment to the United States Constitution and its violation in the case at bar is the sole issue before this Court because, as Judge Clark pointed out in his dissent below, the record clearly shows that "in plain fact he (the petitioner) was required to incriminate himself" (R 58). To this, the Government has, in fact, made no answer.

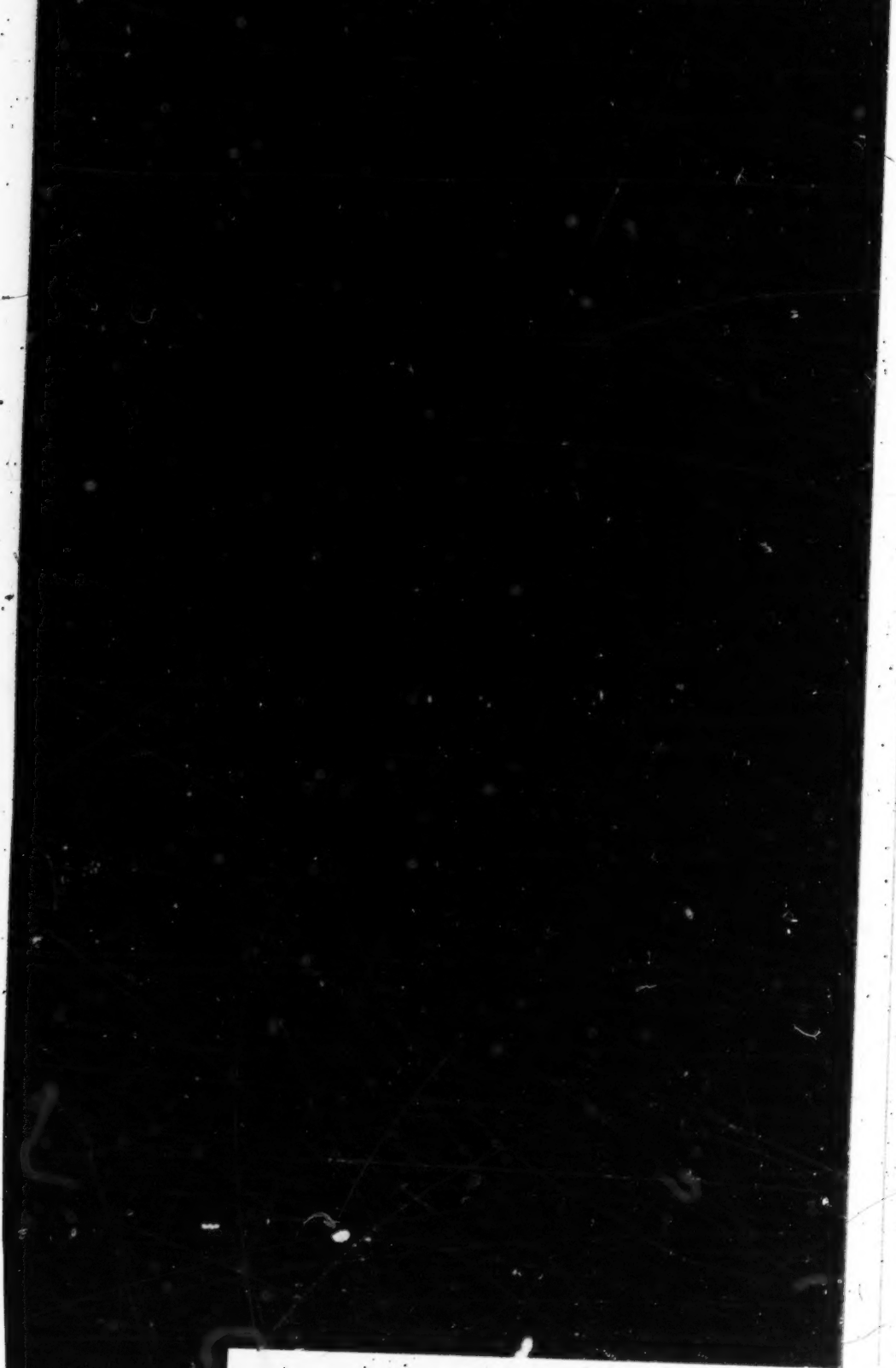
CONCLUSION

For the foregoing reasons we again respectfully submit that the judgment of the Circuit Court should be reversed.

JAMES MARSHALL,
SEYMOUR M. KLEIN,
Attorneys for Petitioner.

On the Brief:

HARRY L. WECHSLER,
MARVIN J. BLOCH.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	13
Conclusion	33

CITATIONS

Cases:

Abbott v. *State*, 75 N. Y. 602	17
Arndstein v. *McCarthy*, 254 U. S. 71	14, 19
Baker v. *United States*, 115 F. (2d) 533	27, 31
Boitano v. *United States*, 7 F. (2d) 324	17
Boyd v. *United States*, 116 U. S. 616	22
Burdeau v. *McDowell*, 256 U. S. 465	22
Chambers v. *United States*, 237 Fed. 513	26, 31
Clark v. *State*, 68 Fla. 433	18, 19
Cohen v. *United States*, 170 Fed. 715	20
Commonwealth v. *Ensign*, 228 Pa. 400, affirmed, *Ensign* v. *Pennsylvania*, 227 U. S. 592	20
Commonwealth v. *MacKenzie*, 211 Mass. 578	17
Counselman v. *Hitchcock*, 142 U. S. 547	14
Czarlinsky v. *United States*, 54 F. (2d) 889, certiorari denied, 285 U. S. 549	17, 20
Doyle, Matter of, 257 N. Y. 244	14, 16
Durland v. *United States*, 161 U. S. 306	27, 31
Dunham v. *Ottinger*, 243 N. Y. 423	21
Ensign v. *Pennsylvania*, 227 U. S. 592	18, 19
Federman v. *United States*, 36 F. (2d) 441, certiorari denied, 281 U. S. 729	12
Ex parte Fuller, 262 U. S. 91	22
Gould v. *Gould*, 201 App. Div. 674, 194 N. Y. S. 742	21
Grae, Matter of, 282 N. Y. 428	16
Graves v. *United States*, 150 U. S. 118	32, 33
Great Western Turnpike Co. v. *Loomis*, 32 N. Y. 127	15
Hamburg-American Steam Packet Co. v. *United States*, 250 Fed. 747	33
Harris, Matter of, 221 U. S. 274	22
Heike v. *United States*, 227 U. S. 131	16
Hendrickson v. *People*, 10 N. Y. 13	17

Cases—Continued.

	Page
Ex parte Irvine, 74 Fed. 954	15, 19
Jianole v. *United States*, 299 Fed. 496	28
Johnson v. *United States*, 163 Fed. 30	20
Johnson v. *United States*, 228 U. S. 457	22
Kettenbach v. *United States*, 202 Fed. 377, certiorari denied, 229 U. S. 613	28
Knickerbocker Merchandising Co. v. *United States*, 13 F. (2d) 544, certiorari denied, 273 U. S. 789	27, 31
Linn v. *United States*, 234 Fed. 543	27, 31
Lowe v. *United States*, 115 F. (2d) 596, certiorari denied, 311 U. S. 717	12
Milton v. *United States*, 110 F. (2d) 556	17
Norman v. *United States*, 100 F. (2d) 905, certiorari denied, 306 U. S. 660	27, 31
Norton v. *United States*, 92 F. (2d) 753	27
Olmstead v. *United States*, 277 U. S. 438	22
Opiner v. *United States*, 13 F. (2d) 11	20
Palko v. *Connecticut*, 302 U. S. 319	18
Packer v. *United States*, 106 Fed. 906	28
People v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940	14
People v. *Cassidy*, 213 N. Y. 388	15
People v. *Johnston*, 228 N. Y. 332	15
People ex rel. Lewisohn v. *O'Brien*, 176 N. Y. 253	14
People ex rel. Taylor v. *Forbes*, 143 N. Y. 219	14
People v. *Rosenheimer*, 209 N. Y. 115	23
People v. *Wieger*, 100 Cal. 352	17
Rimmerman v. *United States*, 186 Fed. 307, certiorari denied, 223 U. S. 721	27, 31
Rostello v. *United States*, 36 F. (2d) 899	33
Schauble v. *United States*, 40 F. (2d) 363	26, 31
Schroeder v. *United States*, 7 F. (2d) 60	22
Silkworth v. *United States*, 10 F. (2d) 711, certiorari denied, 271 U. S. 664	32
Simpkins v. *United States*, 78 F. (2d) 594	28
Slakoff v. *United States*, 8 F. (2d) 9	20
State v. *Cummins*, 76 Ia. 133	23
State v. *Donovan*, 10 N. D. 203	23
State v. *Drew*, 110 Minn. 247	19, 20
State v. *Robinson*, 37 Ore. 43	17
State v. *Smith*, 74 Ia. 580	23
Twining v. *New Jersey*, 211 U. S. 78	18
Ute v. *State*, 208 Ind. 255	23
United States v. *Comyns*, 248 U. S. 349	27, 31
United States v. *Dalton*, 286 Fed. 756	23
United States v. *One Ford Coupe*, 3 F. (2d) 64	22
United States v. *Groves*, 122 F. (2d) 87, certiorari denied, 314 U. S. 670	26, 31

Cases—Continued. Page

United States v. *Mary Helen Coal Corp.*, 24 F. Supp. 50 ... 17
United States v. *Monia*, 317 U. S. 424 ... 15
United States v. *Mulligan*, 268 Fed. 893 ... 23
United States v. *Murdock*, 284 U. S. 141 ... 15, 21
United States v. *Rowe*, 56 F. (2d) 747, certiorari denied, 286 U. S. 554 ... 27, 31
United States v. *Shurtleff*, 43 F. (2d) 944 ... 28, 29
Vajtauer v. *Commissioner*, 273 U. S. 103 ... 15
Walsh v. *United States*, 174 Fed. 615, certiorari denied, 215 U. S. 609 ... 28
Weeks v. *United States*, 232 U. S. 383 ... 22
Williams v. *Commonwealth*, 29 Pa. 102 ... 17
Wilson v. *United States*, 162 U. S. 613 ... 15, 17, 18
Wilson v. *United States*, 221 U. S. 361 ... 23
Wine v. *United States*, 260 Fed. 911, certiorari denied, 253 U. S. 484 ... 27, 31
Wolf v. *United States*, 290 Fed. 738 ... 28
Wolfson v. *United States*, 101 Fed. 430, certiorari denied, 180 U. S. 637 ... 28

Statutes:

Criminal Code, Sec. 215, 18 U. S. C. 338 ... 2
New York Civil Practice Act, L. 1935, c. 630, § 789 ... 3, 14
New York Civil Practice Act, § 789, as amended March 14, 1938 (L. 1938, c. 108) ... 3,
New York Consolidated Laws (Cahill), c. 41, secs. 921, 925, 931, 938 ... 14
New York Constitution, Art. 1, sec. 6 ... 14

Miscellaneous:

8 Wigmore, Evidence (3d ed. 1940):
P. 363 ... 21
Sec. 2259 ... 23
Sec. 2176 ... 15
Sec. 2327 ... 33

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 1666–1675) and dissenting (R. 1675–1677) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 24, 1943 (R. 1678–1679). The petition for a writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the admission in evidence against petitioner of his testimony in New York supplementary proceedings in which he was examined as a judgment debtor was a violation of his constitutional privilege against self-incrimination.

2. Whether reversible error resulted from—

a. The restriction of petitioner's cross-examination of the Government witnesses Goetz and Miller.

b. The admission of evidence of other offenses committed in connection with petitioner's transactions with Emanuel & Co. in 1930.

c. The submission to the jury of the Government's bill of particulars containing the names of numerous of petitioner's alleged victims as to whom there was no proof.

d. The trial court's charge to the jury and refusal of instructions asked by petitioner.

e. A comment, by Government counsel on summation, on petitioner's failure to call a certain witness.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or

> for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 789 of the New York Civil Practice Act (L. 1935, c. 630), prior to March 14, 1938, provided:

> A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * *. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination.

Effective as of March 14, 1938 (L. 1938, c. 108, sec. 17), this statute was amended so as to provide also that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concern-

ing which he may so testify or produce evidence, documentary or otherwise."

STATEMENT

On August 20, 1940, petitioner was indicted, in the District Court of the United States for the Southern District of New York, on nine counts charging him with having used the mails in execution of a scheme to defraud two classes of persons, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 2–14). Seven counts were submitted to the jury (R. 1473–1476).[1] Petitioner was found guilty on all of them (R. 1509), and he was sentenced to five years' imprisonment on each, the sentences to run concurrently (R. 20, 1510-1511).[2] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 1666–1675, 1678–1679), one judge dissenting (R. 1675–1677).

The scheme to defraud with which petitioner was charged consisted of "kiting" checks, described by Government witness Robinson as "a scheme whereby checks are drawn against insufficient funds and the delay in clearing [one] check is taken advantage of by cashing a[nother] check

[1] A verdict was directed for petitioner on counts 2 and 4, for the reason that they were based on the same mailings as counts 1 and 3 (R. 1475–1476, 474–475).

[2] On two counts, however, the sentence was suspended and petitioner was placed on five years' probation, to begin at the end of the service of his sentences on the other counts (R. 20, 1510–1511).

within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (R. 1166).[3] The two classes of petitioner's intended victims were (1) Those whom he would induce to cash checks for him, and (2) those whom he would induce to sign checks in blank and deliver to him (R. 3). While nine victims of the first class were named in the indictment (R. 3) and about 102 more in the Government's bill of particulars (R. 14y–14dd), the only mailings alleged with respect to this class of intended victims related to petitioner's transactions with the Essex House (R. 6–9), a New York apartment hotel. Edwin S. Reynolds was the only named victim of the second class (R. 3, 9–14, 14cc). Since the only mailings charged were in furtherance of the Essex House and Reynolds transactions, it was upon these transactions primarily that the Government's case rested. Transactions with other alleged victims were significant only insofar as they constituted a part of the same scheme to defraud, or provided evidence of the fraudulent intent with which petitioner's transactions with the Essex House and Reynolds were conducted.[4]

Between October 1935 and October 1936, although living in New York, petitioner maintained

[3] The meaning of the term "kite" in banking parlance is similarly described by Government witness Moore (R. 435–437).

[4] The trial court so instructed the jury (R. 1485–1486).

a bank account in his own name at the Emmett County State Bank in Harbor Springs, Michigan (R. 47–48; Gov. Ex. 85, R. 631, 1578–1579; Gov. Ex. 100, R. 1288, 1614). He frequently cashed checks for large amounts drawn on this account without having funds therein to meet them (R. 49–50). They were covered by the cashing of additional checks and wiring of the proceeds in the necessary amount to the bank (R. 52, 54, 57–58).[5] On August 10, 1936, when a $5,000 check arrived at the bank with only $147.67 in the account to cover it, the cashier by telephone asked petitioner to close out the account (R. 48–53). After the account was closed, checks written by petitioner continued awhile to come in and were protested for nonpayment (R. 52, 59–60).

Upon being asked to close out the account in the Emmett County Bank, petitioner, on August 26, 1936, personally opened an account in the name of his father, J. Feldman, of Petoskey, Michigan, in the First National Bank of Petoskey (hereinafter called the Petoskey Bank). When the cashier objected to opening the account for the reason that the bank had had prior experience with checks of J. Feldman drawn on insufficient funds and did not consider him a good credit risk,

[5] The Government witness Clarke, cashier of the Emmett County State Bank, testified: "The check would come through the mails in the morning and the check to pay it, the Western Union draft, would be deposited before three in the afternoon" (R. 57).

petitioner stated that he was well able to give his father financial assistance and would guarantee the account, which was thereupon opened with an initial deposit of $1,000 in currency (R. 61–62, 71, 74). On September 15, 1936, J. Feldman executed an authorization giving petitioner and Alfred B. Frank, who was J. Feldman's son-in-law and bookkeeper (R. 156–157), access to the account (Gov. Ex. 13, R. 65, 1527).[6]

From shortly after the opening of the Petoskey Bank account until August 21, 1937 (the period covered by petitioner's transactions with the Essex House), and thereafter from September 1938 until April 1939 (the period covered by his transactions with Stout & Co.), petitioner operated a check "kite" between New York City and the

[6] Although thus representing himself in August 1936 as a man of means, petitioner on March 31, 1936, in New York supplementary proceedings brought against him as a judgment debtor, had testified under oath that he was not then employed and never had been employed; that he had no business of his own and owned no stocks, bonds, or securities; that he lived on money supplied by members of his family; and that unpaid judgments against him totaled $150,000 (Gov. Ex. 85, R. 631, 1578–1580). In further proceedings of the same character he testified, on October 28, 1936, that he had been in the fur business, but since that business had been bad of late he had virtually given up all fur contacts; that he lived on money borrowed from friends and from his father, brothers, and sisters, who were "fairly wealthy"; and that there were 125 judgments outstanding against him totaling about $340,000 (Gov. Ex. 100, R. 1288, 1613–1615). By his own admissions, petitioner's judgment debts thus had increased by almost $200,000 between March and October 1936.

Petoskey Bank (R. 1165–1232, 1274–1278). His father would sign checks in blank in Petoskey and mail them to petitioner in New York, where petitioner would fill in the date, payee's name, and amount (R. 160; Gov. Ex. 102–B–C, R. 1287, 1621, 1623–1624). Between January 1 and August 21, 1937, petitioner cashed these checks in New York in the total amount of $910,842.25 (R. 1154). Of this amount $805,593.94 represented checks cashed by the Essex House (R. 498, 1170–1177). At no time did the balance in the Petoskey Bank account equal or exceed the amount of checks drawn and outstanding against it (R. 1177–1178). The drawing of each check was predicated upon petitioner's "being able to cash another check and wire the funds to cover the check drawn" (R. 1165). The successful operation of the "kite" was predicated in part upon the time factor of four or five days that it took for a check to clear between New York and Petoskey, passing through the Chicago Federal Reserve Bank (R. 72, 109, 121, 431–432, 467, 483–484, 1166–1167). When checks were about to arrive at the Petoskey Bank for payment petitioner would communicate by wire or telephone with Alfred Frank, or with the bank, in order to ascertain the amount needed to cover, and would then transmit by wire the proceeds of another check, or a part thereof, to Frank for deposit in the account (R. 78, 110–111, 169–171, 173, 176, 194–195, 203, 280–283, 298–299, 304–307, 377). The total amount transmitted by wire between

January 1 and August 21, 1937, was $860,930, as against $910,842.25 of checks cashed (R. 1159).

It was petitioner's practice to have employees of the Western Union branch office nearest the Essex House come to his apartment for the money (R. 297–300, 358–359, 361–364, 373–380). On a number of occasions petitioner wired funds under other names than his own, using most frequently the name of Joseph Little (R. 190–202, 300–302, 366, 380–381, 461–462), who was credit manager of the Essex House (R. 506, 508, 514, 521) while petitioner was a tenant there from September 10, 1936, until he was asked to leave in the latter part of August 1937 (R. 520, 529). In approving checks for petitioner, Little overstepped his authority and was discharged when the situation that developed was brought to the attention of the managing director (R. 523–524, 542) by the resident auditor (R. 493, 523) and by an officer of the National City Bank who, from an examination of the Essex House account, suspected that a check "kite" was in operation (R. 411–414). There is no evidence, however, that Little knew that petitioner was engaged in check "kiting," or that he authorized the use of his name by petitioner in the wiring of funds to Petuskey.

Although the Essex House transactions did not reach their peak until August 1937,[7] petitioner had

[7] During the first 21 days of August checks totaling $141,157.09 were cashed for petitioner by the Essex House (R. 1177).

admitted, in testimony sworn to in New York supplementary proceedings on July 21, 1937, that "I am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. * * * I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one"; that he had been "kiting" for seven months; that he had torn up Western Union receipts for money wired, so as "not to have people know what I am doing"; and that he intended to file a petition in bankruptcy immediately (Gov. Ex. 102-B-C-D-E, R. 1287, 1621-1628). Although thus intending on July 21 to file a petition in bankruptcy "immediately," he proceeded in the first 21 days of August to draw on insufficient funds checks totaling $150,900 (R. 1177).

When on August 21, 1937, after investigation and discovery of the character and magnitude of petitioner's "kiting" activities, the Essex House ceased cashing checks for him, there were in transit to Petoskey for payment 9 checks cashed by it between August 16 and August 20, totaling $30,700 (R. 1180). The balance in the Petoskey Bank at the time was $.24 (R. 1178). Checks in this group were the subject matter of the mailings of August 20 and 21 alleged (R. 6-9) and proved (R. 468-

475) under counts 1–4 of the indictment.* The 9 checks totaling $30,700 were protested for nonpayment. (R. 480–483). Petitioner told the managing director and attorney for the Essex House that neither he nor his father had any money, but that if they would give him time he would make the checks good (R. 521–522, 592–593).

Thereafter petitioner telephoned Edwin S. Reynolds at Dayton, Ohio (R. 596–598), and at petitioner's request Reynolds signed in blank and mailed to petitioner a number of checks on his account in the Winters National Bank and Trust Co. of Dayton, telling petitioner that there was no money in the account and that he should not cash the checks without sending funds to cover them (R. 598–601, 663, 667–669). Petitioner, however, filled out four of them, two for $6,000 each and two for $10,000 each, and got William Erb, a broker employed by the New York Stock Exchange firm of Munds, Winslow & Potter, to cash them (R. 551–553, 569–577; Gov. Exs. 59–A–B–C, 60–A–B–C, 62, 63, R. 589, 573, 1552, 1554). With the proceeds, he took up the $30,700 of unpaid checks cashed by the Essex House (R. 1181–1187).

The Reynolds checks were protested for nonpayment (R. 553, 577–578). They were the subject matter of the mailings of August 23, 25, 26, 27, and 28 alleged (R. 9–14) and proved (R. 581–589)

*On earlier mailings the applicable three-year statute of limitations (18 U. S. C. 582) had run at the time the indictment was filed on August 20, 1940 (R. 1).

under counts 5–9. When the attorney for Reynolds' mother demanded payment, petitioner replied that "he didn't have any money; he was broke and down and out and couldn't get up the money" (R. 668, 672). Erb and Munds, Winslow & Potter, were reimbursed, for the $32,000 given petitioner on the Reynolds checks, by Reynolds' mother, who received from petitioner two notes for $12,000 and $20,000, respectively (R. 673–680; Gov. Ex. 86, R. 680, 1580, Def. Ex. N, R. 1411, 1634). The first was subsequently returned by Reynolds to petitioner (R. 1410–1412); the second, although reduced to judgment, remains unpaid (R. 690–691, 695–696, 699–700).

Petitioner's subsequent transactions with Stout & Co. between September 1938 and April 1939 (R. 715–984, 1193–1206, 1274–1278) were essentially similar to those with the Essex House. They resulted in a loss to Stout & Co. of $81,500 and the liquidation of that firm (R. 770–772).[9]

---

[9] Although citing the dissenting judge's expression of doubt whether petitioner "had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished" (Pet. 3; R. 1675), petitioner does not challenge here the sufficiency of the evidence to support the verdict, but relies entirely upon errors alleged to have been committed at the trial. That the acts charged and proved constitute a violation of the mail fraud statute, see *Federman* v. *United States*, 36 F. (2d) 441 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Lowe* v. *United States*, 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717. We have summarized the evidence above in order that petitioner's contentions of prejudicial error may be appraised in the light of the clear and convincing proof of his guilt.

ARGUMENT

I

Petitioner did not take the stand at the trial, and he contends that the admission in evidence against him of his testimony given in New York supplementary proceedings on various occasions between March 31, 1936, and September 29, 1939 (R. 1578, 1580, 1589–1607, 1613–1628), was the equivalent of wringing it from his own lips within the meaning of the privilege against self-incrimination provided by the Fifth Amendment (Pet. 3–4, 13–23). As shown in the Statement (*supra*, pp. 9–10), petitioner, by his testimony given in the supplementary proceedings in July 1937, convicted himself out of his own mouth of having been engaged, for a period of seven months immediately prior to the first of the transactions charged in the indictment, in the same check "kiting" scheme of which the later transactions were in furtherance.

Petitioner's contention, and indeed the majority and dissenting opinions in the court below, proceed upon the premise that the testimony was given under the compulsion of a state immunity statute. We shall show (a) that the testimony was not in fact so given and hence the question sought to be raised is not presented, and (b) that, in any event, its admission in evidence was not the equivalent under the Fifth Amendment of

compelling petitioner to testify; and that therefore the decision of the court below was correct from every point of view.

a. Prior to March 14, 1938, Section 789 of the New York Civil Practice Act (*supra*, p. 3) did not purport to confer any immunity from prosecution, even in the courts of New York, for a crime disclosed in testimony given in supplementary proceedings, but merely provided that such testimony could not be used against the witness in a subsequent prosecution. New York has long followed *Counselman* v. *Hitchcock*, 142 U. S. 547, in holding that the constitutional privilege against self-incrimination is not avoided by a statute of this sort.[10] Petitioner therefore could have made a claim of privilege with the right to have it recognized, on the basis of incrimination under state law,[11] in the supplementary proceedings conducted prior to March 14, 1938.[12] But the

---

[10] *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903); *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 229 (1894); *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940, 948 (Extraordinary Trial Term, Erie County, 1922); see *Matter of Doyle*, 257 N. Y. 244, 251 (1931).

[11] The privilege against self-incrimination is provided by Art. 1, Sec. 6, of the New York Constitution. The testimony given by petitioner prior to March 14, 1938, was incriminating of fraud under state as much as under federal law. See New York Consolidated Laws (Cahill), c. 41, secs. 921, 925, 932, 938.

[12] Cases cited *supra*, note 10; cf. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73, holding that Section 7 of the Bankruptcy Act (Act of July 1, 1898, c. 541, sec. 7, 30 Stat. 544, 548; 11

privilege against self-incrimination is waived by failure to claim it,[13] and petitioner, although represented by counsel in the New York proceedings (see R. 1597, 1625–1626), made no claim of privilege. His testimony given prior to March 14, 1938, which we have set forth in the Statement (*supra*, pp. 7, 9, 10) and which includes the only damaging admissions, must, therefore, in contemplation of law, be deemed to have been entirely voluntary.[14] All of the testimony given after March 14, 1938 (R. 1288, 1588–1607, 1616–1619), when a true immunity clause was added to the statute, was clearly but a repetition, during subsequent proceedings of the same character,[15] of portions of the earlier testimony which were not *per se* incriminating. Standing by itself, the

---

U. S. C. 25), which is similar to the New York statute here involved as it stood prior to March 14, 1938, does not render inapplicable to a debtor's examination in bankruptcy the privilege against self-incrimination provided by the Fifth Amendment: *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[13] *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *People* v. *Johnston*, 228 N. Y. 332, 340 (1920); *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127, 138 (1865); see, also, *United States* v. *Monia*, 317 U. S. 424, 427; *People* v. *Cassidy*, 213 N. Y. 388, 395 (1915).

[14] Cf. *Wilson* v. *United States*, 162 U. S. 613.

[15] The rule of most American courts is that testimony as to a particular transaction, given voluntarily when an incriminating question is first asked, waives the privilege completely as to all other inquiries pertinent to that transaction. 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2276.

testimony given after March 14, 1938, would not have been privileged at all, as of the time it was given, in any state proceeding; and therefore the power to compel such testimony in the supplementary proceedings did not in any way depend upon the immunity clause of the statute.[16] Hence, petitioner would have derived no immunity, even in the courts of New York, by virtue alone of the testimony given after March 14, 1938.[17] Furthermore, even if such testimony were incriminating and therefore privileged, it was at most only cumulative of that given prior to that date, and, consequently, petitioner could not have been prejudiced by its admission in the trial below.

Since the testimony given prior to March 14, 1938, although portions of it were incriminating under state law, was not given pursuant to an immunity statute or made the subject of a claim of privilege, and that given after March 14, 1938, evoked no privilege for the immunity statute to avoid and, in any event, was merely cumulative, it follows that the New York statute, both before and after amendment, is without relevance to this case; that the situation is the same as though petitioner had testified at all times as an ordinary witness entitled to assert the privilege, where applicable; and that his testimony given in the New

[16] *Heike* v. *United States*, 227 U. S. 131, 143; accord, see *Matter of Doyle*, 257 N. Y. 244, 267 (1931); but cf. *Matter of Grae*, 282 N. Y. 428, 434 (1940).

[17] *Heike* v. *United States*, *supra*, note 16.

York supplementary proceedings was admissible against him at his trial below under the general rule "that if a defendant in a criminal case has testified in some other proceeding, such testimony may be used against him as an admission in a criminal case."[18] Under this rule, testimony by a criminal defendant previously given before a grand jury or coroner's inquest, or in state insolvency proceedings, has been held to be admissible against him at his trial.[19] In *Wilson* v. *United States*, 162 U. S. 613, this Court held in a capital case that the testimony of the defendant, given before a United States Commissioner at a preliminary hearing, was admissible against him at his trial, although he had not been represented by counsel at the time and had not been informed of his privilege against self-incrimination. In the light of this decision, coupled with the irrelevance of the New York statute, petitioner's contention (Pet. 8), as a reason for issuance of the writ of

[18] *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893 (C. C. A. 10), certiorari denied, 285 U. S. 549.

[19] *Commonwealth* v. *MacKenzie*, 211 Mass. 578, 580 (1912). *People* v. *Wieger*, 100 Cal. 352, 358 (1893); *Hendrickson* v. *People*, 10 N. Y. 13, 27–28 (1854); *Abbott* v. *State*, 75 N. Y. 602 (1878); *State* v. *Robinson*, 32 Ore. 43, 51 (1897); *Williams* v. *Commonwealth*, 29 Pa. 102, 105 (1857); *Milton* v. *United States*, 110 F. (2d) 556, 559–560 (App. D. C.); *Boitano* v. *United States*, 7 F. (2d) 324, 325 (C. C. A. 9); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.): "The Fifth Amendment affords no immunity to a witness against the use of his voluntary testimony against him."

certiorari, that the problem here is a doubtful one which "far transcends the use of compulsory testimony obtained in supplementary proceedings" and which has not been but should be settled by this Court, is without merit. To contend that *Wilson* v. *United States* is not controlling of the issue here would be to assert that prior incriminating testimony given without objection comes under the Fifth Amendment at a subsequent trial by virtue of the fact alone that the privilege waived in the prior proceeding derived not from the Fifth Amendment but from a comparable state constitutional provision.[20]

Petitioner relies upon *Clark* v. *State*, 68 Fla. 433, 436 (1914), which holds without discussion that the introduction in a state criminal trial of testimony given by the defendant pursuant to Section 7 of the Bankruptcy Act (11 U. S. C. 25), in an involuntary bankruptcy proceeding, constitutes a violation of the state constitutional privilege against self-incrimination by "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself." This decision, while concededly supporting petitioner's position, was obviously ill-considered. Section 7 of the Bankruptcy Act provides merely that the bank-

[20] The privilege against self-incrimination as provided by the Fifth Amendment, of course, has no application to the states. *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597; *Twining* v. *New Jersey*, 211 U. S. 78, 93; cf. *Palko* v. *Connecticut*, 302 U. S. 319.

rupt's testimony shall not be "offered in evidence against him in any criminal proceeding"[21] and does not purport to provide any immunity. It therefore does not avoid the constitutional privilege, which can be claimed in bankruptcy proceedings despite the statute. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73; cf. *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio). Testimony given without claiming the privilege was thus legally voluntary. It follows that *Clark* v. *State*, if consistently applied, would establish a principle that treats the introduction of any admission, however voluntary, as "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself." Such a principle, which would completely abrogate the application to criminal proceedings of a well-recognized exception to the hearsay rule, clearly is not the law; and the sweeping character of the court's decision on the facts before it weakens its authority in support of petitioner's position here.[22]

---

[21] Presumably the prohibition applies only to federal criminal proceedings. Cf. *Ensign* v. *Pennsylvania*, 227 U. S. 592. In the exercise of the bankruptcy power Congress conceivably might validly prohibit the use of the testimony in state courts.

[22] Petitioner might also have cited *State* v. *Drew*, 110 Minn. 247, 251–253 (1910), which holds that the introduction, in a state criminal trial, of schedules of assets and liabilities filed by the defendant pursuant to Section 7 of the Bankruptcy Act, in an involuntary bankruptcy proceeding, constitutes a violation of his constitutional privilege against self-incrimination. The court relied upon two federal decisions which

Since petitioner was not in fact compelled by virtue of a state immunity statute to make incriminating admissions, the situation of one being trapped "between the interstices of the overlapping state and federal sovereignties," alluded to in the dissenting opinion (R. 1676), is not presented by this case; and no circumstances exist to justify departure from the general rule whereby admissions made in testimony given in other pro-

---

held, however, merely that such schedules were protected from use in other federal proceedings by virtue of Section 860 of the Revised Statutes, repealed in 1910. (36 Stat. 352). *Johnson* v. *United States*, 163 Fed. 30 (C. C. A. 1); *Cohen* v. *United States*, 170 Fed. 715 (C. C. A. 4). *State* v. *Drew*, moreover, is directly *contra* to *Commonwealth* v. *Ensign*, 228 Pa. 400 (1910), affirmed in *Ensign* v. *Pennsylvania*, 227 U. S. 592, where this Court held (p. 599) that it is "only the testimony given upon the examination of the bankrupt under clause 9 [of Section 7] that is prohibited from being offered in evidence against him in a criminal proceeding" and not the schedules filed pursuant to clause 8. For holdings that such schedules as distinguished from the bankrupt's testimony are admissible in federal criminal proceedings, see *Slakoff* v. *United States*, 8 F. (2d) 9, 10 (C. C. A. 3); *Optner* v. *United States*, 13 F. (2d) 11, 12–13 (C. C. A. 6); *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893–894 (C. C. A. 10), certiorari denied, 285 U. S. 549. Since Section 7 is not an immunity statute, as to either schedules or testimony, it follows that in a state criminal trial any testimony voluntarily given without a claim of privilege in the bankruptcy proceeding can have no greater sanctity than the schedules, unless by virtue of a possible application to state as well as federal proceedings of the provision of clause 9 prohibiting the subsequent use of the testimony. Such protection as is afforded to the testimony after it is given derives solely from the statute and not from any state or federal constitutional privilege.

ceedings are receivable in evidence against a criminal defendant.

b. Even assuming *arguendo* that the testimony given in New York supplementary proceedings subsequent to the amendment of the New York statute on March 14, 1938, was sufficiently incriminating to evoke the state constitutional privilege against self-incrimination and hence the state immunity provision, the decision of the circuit court of appeals, it is submitted, would still be correct. The privilege is one primarily against *testimonial* compulsion,[23] and here the only such compulsion occurred in the state proceedings. Since the privilege against self-incrimination provided by the Fifth Amendment does not apply to the states,[24] no federal right of petitioner's would have been violated by New York's compelling incriminating testimony. Furthermore, since the privilege applies only to answers incriminating under the laws of the jurisdiction exercising the compulsion,[25] New York could not have violated its own constitutional privilege against self-incrimination by virtue alone of the compelled disclosure by petitioner of a federal offense. The use of the incriminating testimony at the federal trial thus does not carry even the taint of unlawful state or private

[23] 8 Wigmore, *Evidence* (3d ed. 1940), p. 363.

[24] Cases cited note 20, *supra*, p. 18.

[25] *United States* v. *Murdock*, 284 U. S. 141, 149; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438 (1926); *Gould* v. *Gould*, 201 App. Div. 674, 194 N. Y. S. 742 (1922); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2258, pp. 337–341.

action that has been held not to preclude the introduction at a federal trial of evidence secured by an unconstitutional search and seizure committed by state officers or secured by the trespass of private individuals.[26]

Nor does the mere fact that the testimony was compelled by state action render its admission at the trial below a violation of the federal privilege against self-incrimination. While this Court has held that the Fifth Amendment forbids compelling a witness to produce self-incriminating documents belonging to him and in his possession,[27] it has refused to extend the protection of the Amendment any further and has held that by it "A party is privileged from producing the evidence but not from its production."[28] Thus, the title to and possession of incriminating books and papers of a bankrupt may be transferred by operation of law to the trustee in bankruptcy, from whom in turn they may be procured by compulsion for use as evidence against the bankrupt without any violation of the latter's constitutional privilege.[29] The mak-

---

[26] *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465; *Schroeder* v. *United States*, 7 F. (2d) 60 (C. C. A. 2); *United States* v. *One Ford Coup*, 3 F. (2d) 64 (W. D. La.); cf. *Olmstead* v. *United States*, 277 U. S. 438.

[27] *Boyd* v. *United States*, 116 U. S. 616, 618.

[28] *Johnson* v. *United States*, 228 U. S. 457, 458.

[29] *Ex parte Fuller*, 262 U. S. 91, 93–94; *Johnson* v. *United States*, 228 U. S. 457, 458; *Matter of Harris*, 221 U. S. 274, 279–280.

ing of an incriminating record or report may be validly compelled by a law previously in existence, and after being made it becomes public property to which no constitutional privilege attaches.[30]

---

[30] *Ule* v. *State*, 208 Ind. 255 (1935); *State* v. *Cummins*, 76 Ia. 133, 136 (1888); *State* v. *Smith*, 74 Ia. 580, 584 (1888); *People* v. *Rosenheimer*, 209 N. Y. 115, 120 (1913); *State* v. *Donovan*, 10 N. D. 203 (1901); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.); *United States* v. *Dalton*, 286 Fed. 756, 757 (W. D. Wash.); see *Wilson* v. *United States*, 221 U. S. 361, 380–382; 8 Wigmore, *Evidence* (3d ed., 1940), sec. 2259, pp. 349–352: "The duty, or compulsion, is directed * * * to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. * * * The generalization, therefore, may be made, that *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting.* Such records therefore are not protected by the present privilege against self-incrimination. * * * The foregoing logic leads to the same result where the report required by law to be made is *oral* only; *e. g.*, those laws which require a person whose *vehicle*, machinery, or other property has *caused an injury, to make an oral disclosure* to an official, at the *time*, of his name and address or of other circumstances of the injury. The *logic* is the same; for here also the purpose is administrative, the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts, so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding, and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality." [Italics the author's.]

The present case, if the testimony had been in fact compelled, would be governed by the same principles. Petitioner's statutory duty in New York of supplying information in aid of his judgment creditors was anterior to and independent of the criminal conduct of which he now stands convicted; it related to a generic class of acts and not to criminal conduct as such; the disclosure of crime was only incidental; his testimony was in effect an oral report which became the property of the state of New York; and he has no constitutional privilege against the production of the document, not belonging to him or in his possession, which contains such testimony. A contrary result in the present case would cast doubt on the admissibility against criminal defendants of various classes of legally required reports, such as income-tax returns, which, like the recorded evidence here involved, are of exceptional trustworthiness and are not the product of federal testimonial compulsion.

We therefore submit that, even though viewed as presenting the specific question (hitherto undecided) of the admissibility at a federal criminal trial of incriminating testimony secured from the defendant under the compulsion of a state immunity statute, the decision of the court below is entirely consistent with controlling principles and analogies.

II

As clear as petitioner's guilt was on the basis of the entire record, the other matters complained of could not have been prejudicial even if error was committed. They therefore do not require extensive consideration.

a. The Stout & Co. transactions, as set forth on the direct examination of the Government witnesses Goetz (R. 761–775, 832–839, 884–887, 1030–1032) and Miller (R. 840–855, 907–912, 980–982), were not, as petitioner contends (Pet. 14), "vital parts of the Government's case." This is clear from the fact that no mailing in furtherance of any of these transactions was the basis of any count of the indictment (see R. 2–14), and the jury was accordingly instructed that a conviction could not be based upon them (R. 1485–1486). Even so, petitioner was allowed wide latitude in his cross-examination of these witnesses (R. 776–832, 856–883, 887–896, 902–907, 913–980, 983–984, 1032), which covers three times as many pages of the record as their direct examination (170 pages as compared with 55). Petitioner complains that the trial court erred in precluding him from showing on cross-examination of Goetz and Miller that, as the partners of Stout & Co., they had carried insurance against losses resulting from fraud, yet had failed to file a claim for the $81,500 loss resulting from their transactions with petitioner

which had caused their liquidation, and that they had, in fact, withdrawn a claim for a portion of the amount, under circumstances indicating an opinion on their part at the time that they had no valid claim of fraud (Pet. 4–5, 14, 23–24; R. 891–902, 972–979, 1012–1026). It is true, as petitioner points out (Pet. 23–24), that a prior expression by a witness of an opinion inconsistent with his testimony at a trial is admissible for impeachment purposes. But there was nothing in the testimony of Goetz or Miller which the excluded evidence of a prior expression, by words or acts, of an opinion that they had not been *civilly* defrauded would have materially contradicted. For the mail fraud statute "is not limited to what would give rise to a civil action." *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670. "It was unnecessary to show that anyone had been actually defrauded, still less, that complaint had been made." *Schauble* v. *United States*, 40 F. (2d) 363, 367 (C. C. A. 8). In *Chambers* v. *United States*, 237 Fed. 513, 523 (C. C. A. 8), a requested instruction "that in order to find that the defendants devised a scheme to defraud in the sale of this land the jury must find that the statements which were made amounted actually to a substantial deception of those to whom the lands were attempted to be sold" was held to have been properly refused for

the reason that "it is not the law."[31] So here, if Goetz and Miller had no civil claim, it was for reasons that are without relevance to petitioner's criminal guilt. It would have been confusing to the jury to have introduced an irrelevant—but to the lay mind difficult to distinguish—issue of civil liability. As it was, the jury was made fully aware on the cross-examination of Goetz that a civil suit had been brought against petitioner on account of the Stout & Co. transactions but had not been prosecuted to judgment (R. 777–782). We therefore submit that the trial court's discretion in controlling the scope of cross-examination was not abused; that petitioner was not prejudiced; and that in fact the circuit court of appeals improvidently conceded error in this connection (R. 1674), since the rule as to impeachment

---

[31] See, also, *United States* v. *Comyns*, 248 U. S. 349, 353; *Durland* v. *United States*, 161 U. S. 306, 313; *United States* v. *Rowe*, 56 F. (2d) 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 545 (C. C. A. 2), certiorari denied, 273 U. S. 729; *Norman* v. *United States*, 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Linn* v. *United States*, 234 Fed. 543, 545 (C. C. A. 7); *Baker* v. *United States*, 115 F. (2d) 533, 538 (C. C. A. 8); *Wine* v. *United States*, 260 Fed. 911, 914 (C. C. A. 8), certiorari denied, 253 U. S. 484; *Rimmerman* v. *United States*, 186 Fed. 307, 310 (C. C. A. 8), certiorari denied, 223 U. S. 721. *Norton* v. *United States*, 92 F. (2d) 753, 755 (C. C. A. 9), cited by petitioner (Pet. 36), does not support his position but holds merely that "There can be no intent to deceive where it is known to the party making the representations that no deception can result."

upon which it relied, while undisputed, is inapplicable here.

b. Contrary to petitioner's contention (Pet. 24–29), the testimony concerning his transactions with Emanuel & Co. in 1930 (R. 985–1010, 1033–1130) was properly admitted. The rule whereby evidence of other similar offenses is admissible as probative, where intent is in issue, "finds its most frequent application, in the field of federal criminal law, in cases of prosecutions for fraud in the use of the mails." *Simpkins* v. *United States*, 78 F. (2d) 594, 598 (C. C. A. 4). Its application is left to the sound discretion of the trial court. *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2). "No limit is placed upon the power of the court to admit evidence of a series of prior similar transactions committed by the accused in the ordinary course of his business." *Kettenbach* v. *United States*, 202 Fed. 377, 384 (C. C. A. 9), certiorari denied, 229 U. S. 613.[32] Here the

[32] In the *Kettenbach* case reports going back seven years were admitted. See, also, *Packer* v. *United States*, 106 Fed. 906, 909 (C. C. A. 2), (one-year time interval, but matter of time said to "rest practically in the discretion of the trial judge"); *Wolfson* v. *United States*, 101 Fed. 430, 433 (C. C. A. 5), certiorari denied, 180 U. S. 637 (over three years); *Walsh* v. *United States*, 174 Fed. 615 (C. C. A. 7), certiorari denied, 215 U. S. 609 (twelve years). The cases relied on by petitioner (Pet. 25–26) rest on lack of similarity rather than on the time interval involved. *Wolf* v. *United States*, 290 Fed. 738, 745 (C. C. A. 2); *Simpkins* v. *United States*, 78 F. (2d) 594, 598 (C. C. A. 4); *Jianole* v. *United States*, 299 Fed. 496, 499 (C. C. A. 8).

Emanuel & Co. transactions occurred in the regular course of the only business that by his own admission petitioner ever had. They involved the element, in common with those charged, of drawing in increasing amounts on an out-of-town concern against funds known to be insufficient and of wiring the money required for coverage, until the chain ended and petitioner was unable to make good a draft for $50,000, resulting in the loss of this amount by Emanuel & Co. (R. 988–989, 996–997, 1003–1004, 1064–1080). As the circuit court of appeals held (R. 1673), the testimony was therefore admissible, in the trial court's discretion, on the issue of intent. In no event, however, was it "of sufficient weight to make reversible error." *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2).

c. Petitioner's contention (Pet. 6–7, 14, 29–31) that the submission to the jury of the Government's bill of particulars, containing the names of numerous of petitioner's alleged victims as to whom there was no proof, constitutes reversible error, is without merit. The trial court clearly instructed the jury that they should "ignore those names entirely just as if they did not appear" (R. 1506) and could convict petitioner only of the transactions in connection with which letters were mailed as charged in the indictment (R. 1485–1486). Petitioner's contention, if tenable,

would apply equally to the giving to the jury (R. 1473) of the indictment, which likewise contained the names of alleged victims (R. 3) as to whom there was no proof.

d. In its original charge the trial court defined the crime in the statutory language, including the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises" (R. 1472, 1473, 1477–1479, 1483, 1484, 1487–1488). Petitioner contends that by so doing, and by refusing his requested instruction that the jury "cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment" (R. 1507), the court permitted his conviction of "a crime for which he was never indicted" (Pet. 7–8, 14, 31–33). But the indictment, although starting with an allegation merely of a "scheme and artifice to defraud" (R. 2), subsequently alleged, in a paragraph of the first count (R. 5–6) incorporated into the rest by reference (R. 7–13), the making of "false and fraudulent representations, pretenses and promises." In a subsequent corrective charge the trial court instructed the jury that it must find "that there was in the defendant's mind a scheme or artifice to defraud," but could consider testimony as to the making of false representations, pretenses, and promises in determining whether there was such a scheme to defraud (R. 1507). This was all pe-

titioner could properly have asked. In fact, no distinction can validly be drawn under the statute whereby a scheme or artifice "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" does not constitute a scheme to defraud. Evidence of the former in any event supports the latter. Petitioner's requested instruction would have improperly taken such evidence out of the case.

Petitioner's requested instructions to the effect that for there to be a scheme to defraud, the intended victim must be ignorant of the facts constituting the scheme and must not knowingly have taken part therein (Pet. 36; R. 1493, 1495), would, without considerable amplification, have been incorrect and misleading as applied to the facts of the case.[33] As the trial court pointed out to petitioner's counsel, in language aptly descriptive of

[33] *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Schauble* v. *United States*, 40 F. (2d) 363, 367 (C. C. A. 8); *Chambers* v. *United States*, 237 Fed. 513, 523 (C. C. A. 8). See, also, *United States* v. *Comyns*, 248 U. S. 349, 353; *Durland* v. *United States*, 161 U. S. 306, 313; *United States* v. *Rowe*, 56 F. (2d) 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 545 (C. C. A. 2), certiorari denied, 273 U. S. 729; *Norman* v. *United States*, 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Linn* v. *United States*, 234 Fed. 543, 545 (C. C. A. 7); *Baker* v. *United States*, 115 F. (2d) 533, 538, (C. C. A. 8); *Wine* v. *United States*, 260 Fed. 911, 914 (C. C. A. 8), certiorari denied, 253 U. S. 484; *Rimmerman* v. *United States*, 186 Fed. 307, 310 (C. C. A. 8), certiorari denied, 223 U. S. 721.

petitioner's later transactions with Stout & Co., "even if the person sought to be defrauded later learned of such scheme and actually took some part in its execution in the hope of not losing through the scheme, that that would not relieve the defendant" (R. 1494). Refusal to give the requested instructions was, therefore, clearly proper.

e. The Government witness Betty King Reynolds, former wife of Edwin S. Reynolds, testified that petitioner offered to pay her $15,000 not to testify against him and threatened her life and comfort if she should (R. 603). Petitioner brought out on her cross-examination that she had not informed the Government of this occurrence until about a year afterward—shortly before the trial—but that she had talked to her lawyer in Florida about it (R. 660–663). In his summation Government counsel commented on petitioner's failure to call the lawyer as a witness (R. 1469). Neither the specific comment nor its context is included in the record. There is, therefore, no adequate basis for appellate review. *Silkworth* v. *United States*, 10 F. (2d) 711, 712 (C. C. A. 2), certiorari denied, 271 U. S. 664. However, such a comment could not in the circumstances have constituted reversible error. The case is different from *Graves* v. *United States*, 150 U. S. 118, relied on by petitioner (Pet. 34), in two respects: (1) here the absent witness was not incompetent but only privileged, and the priv-

ilege could have been waived by the client, Mrs. Reynolds;[34] and (2) his absence could have raised no damaging inference on any issue of real significance in the case.[35]

CONCLUSION

For the reasons stated, the case presents no question warranting review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

SEPTEMBER 1943.

---

[34] 8 Wigmore, *Evidence* (2d ed. 1940), sec. 2327.

[35] In *Graves* v. *United States*, on the other hand, the comment was on the absence of the defendant's wife, whose identification as the woman present at the scene of the crime would have aided in identifying the defendant as the murderer, and the comment raised the inference that this was the reason for her absence. Of the other cases cited by petitioner (Pet. 34), *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747 (C. C. A. 2), held the comment not error, and *Rostello* v. *United States*, 36 F. (2d) 899 (C. C. A. 7), involved an *instruction* to the jury that a presumption against the defendant arose from this failure to call a particular witness.

U. S. GOVERNMENT PRINTING OFFICE 1943

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	12
Argument:	
I. Petitioner's incriminating testimony given in the New York supplementary proceedings prior to March 14, 1938, was voluntary on his part and as such admissible at his trial	15
II. Petitioner's testimony given in the New York supplementary proceedings after March 14, 1938, was not in fact incriminating and was therefore not privileged, and its admission at his trial was not prejudicial	25
III. Even though regarded as compelled by an immunity statute, all of petitioner's testimony given in the New York supplementary proceedings was nevertheless admissible at his trial	35
Conclusion	51

CITATIONS

Cases:	
Aaron Burr's Trial, Robertson's Rep. I, 208, 25 Fed. Cas. No. 14,692e	27
Abbott v. *State*, 75 N. Y. 602	20
Arndstein v. *McCarthy*, 254 U. S. 71	17, 23, 24
Boitano v. *United States*, 7 F. (2d) 324	20
Boyd v. *United States*, 116 U. S. 616	37, 39
Brown v. *Walker*, 161 U. S. 591	47
Burdeau v. *McDowell*, 256 U. S. 465	43
Byars v. *United States*, 273 U. S. 28	43
Clark v. *State*, 68 Fla. 443	21, 23
Cohen v. *United States*, 170 Fed. 715	24
Commonwealth v. *Ensign*, 228 Pa. 400, affirmed in *Ensign* v. *Pennsylvania*, 227 U. S. 592	24
Commonwealth v. *MacKenzie*, 211 Mass. 578	20
Counselman v. *Hitchcock*, 142 U. S. 547	16, 45
Czarlinsky v. *United States*, 54 F. (2d) 889, certiorari denied, 285 U. S. 549	19, 24

Cases—Continued. Page

Dier v. *Banton*, 262 U. S. 147 40
Dunham v. *Ottinger*, 243 N. Y. 423 18
Doyle, Matter of, 257 N. Y. 244 ..... 16, 27
Ensign v. *Pennsylvania*, 227 U. S. 592 ..... 18, 22
Federman v. *United States*, 36 F. (2d) 441, certiorari denied, 281 U. S. 729 5
Fuller, Ex parte, 262 U. S. 91 40
Fuller v. *United States*, 31 F. (2d) 747, certiorari denied, 280 U. S. 556 ..... 14, 36, 38, 39
Gambino v. *United States*, 275 U. S. 310 43
Gould v *Gould*, 201 App. Div. 674, 194 N. Y. S. 742 18
Great Western Turnpike Co. v. *Loomis*, 32 N. Y. 127 17
Harris, Matter of, 221 U. S. 274 40
Haywood v. *United States*, 268 Fed. 795, certiorari denied, 256 U. S. 689 ..... 37, 40
Heike v. *United States*, 227 U. S. 131 ..... 26, 27, 51
Hendrickson v. *People*, 10 N. Y. 13 20
Irvine, Ex parte, 74 Fed. 954 ..... 17, 23
Jack v. *Kansas*, 199 U. S. 372 47
Johnson v. *United States*, 163 Fed. 30 24
Johnson v. *United States*, 228 U. S. 457 ..... 39, 40
Kaiser v. *United States*, 60 F. (2d) 410, certiorari denied, 287 U. S. 654 20
Lowe v. *United States*, 115 F. (2d) 596, certiorari denied, 311 U. S. 717 5
Mason v. *United States*, 244 U. S. 362 27
McGuire v. *United States*, 273 U. S. 95 43
Milton v. *United States*, 110 F. (2d) 556 20
Olmstead v. *United States*, 277 U. S. 438 43
Optner v. *United States*, 13 F. (2d) 11 24
Palko v. *Connecticut*, 302 U. S. 319 18
People v. *Boyd*, 67 Cal. App. 292, 227 Pac. 783 35
People v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940 ..... 16, 28
People v. *Cassidy*, 213 N. Y. 388 17
People v. *Defore*, 242 N. Y. 13 ..... 37, 40
People v. *Hunter*, 249 N. Y. S. 66 37
People v. *Johnston*, 228 N. Y. 332 17
People v. *Keylon*, 122 Cal. App. 408, 10 P. (2d) 86 30
People v. *Kramer*, 14 N. Y. S. (2d) 161 ..... 27, 29, 30
People v. *Lorch*, 13 N. Y. S. (2d) 155 ..... 28, 51
People v. *Reiss*, 8 N. Y. S. (2d) 209, affirmed, 280 N. Y. 539 30
People v. *Rosenheimer*, 209 N. Y. 115 49
People v. *Wieger*, 100 Cal. 352 20
People ex rel. Bekoris v. *Truesdell*, 21 N. Y. S. (2d) 7 28
People ex rel. Coyle v. *Truesdell*, 18 N. Y. S. (2d) 947 ..... 27, 29
People ex rel. Hackley v. *Kelly*, 24 N. Y. 74 ..... 16, 45
People ex rel. Lewisohn v. *O'Brien*, 176 N. Y. 253 ..... 16, 45
People ex rel. Taylor v. *Forbes*, 143 N. Y. 219 16

Cases—Continued. Page

Powers v. *United States*, 223 U. S. 303 ..... 18, 20
Regina v. *Boyes*, 1 Best. & S. 311 27
Regina v. *Erdheim*, (1896) 2 Q. B. 260 42
Regina v. *Garbett*, 2 Carrington and Kirwan 474 41
Regina v. *Robinson*, L. R. 1 C. C. 80, 10 Cox Cr. 467 42
Regina v. *Scott*, Dearsly & Bell's Crown Cases 47 ..... 40, 41
Rex v. *Graham*, 21 D. L. R. 513 43
Rex v. *Harcourt*, 3 D. L. R. 59 42
Ryan v. *Amazon Petroleum Corp.*, 71 F. (2d) 1, reversed on another ground, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 48
Safarik v. *United States*, 62 F. (2d) 892, rehearing denied, 63 F. (2d) 369 20
Schroeder v. *United States*, 7 F. (2d) 60 43
Shushan v. *United States*, 117 F. (2d) 110, certiorari denied, 314 U. S. 706 48
Slakoff v. *United States*, 8 F. (2d) 9 24
State v. *Cummins*, 76 Ia. 133 49
State v. *Donovan*, 10 N. D. 203 49
State v. *Drew*, 110 Minn. 247 24
State v. *Hoffman*, 53 S. D. 182 41
State v. *Qvarles*, 13 Ark. 307 45
State v. *Robinson*, 32 Ore. 43 20
State v. *Smith*, 74 Ia. 580 49
State v. *Thaden*, 43 Minn. 253 27
State v. *Verecker*, 124 Me. 178 23
State v. *Williams*, 69 Oh. App. 361, appeal dismissed, 139 Oh. St. 172 20
State v. *Young*, 119 Mo. 495 41
Turner v. *Commonwealth*, 227 Ky. 520 22
Tuttle v. *People*, 33 Colo. 243 41
Twining v. *New Jersey*, 211 U. S. 78 18
Ule v. *State*, 208 Ind. 255 49
United States v. *Block*, 88 F. (2d) 618 ..... 18, 20
United States v. *Dalton*, 286 Fed. 756 49
United States v. *Mary Helen Coal Corp.*, 24 F. Supp. 50 ..... 18, 20
United States v. *Monia*, 317 U. S. 424 ..... 17, 28, 44
United States v. *Mulligan*, 268 Fed. 893 49
United States v. *Murdock*, 284 U. S. 141 ..... 17, 18, 29, 47
United States v. *One Ford Coupe*, 3 F. (2d) 64 43
United States v. *Sullivan*, 274 U. S. 259 48
Vajtauer v. *Commissioner*, 273 U. S. 103 17
Weeks v. *United States*, 232 U. S. 383 43
Williams v. *Commonwealth*, 29 Pa. 102 20
Wilson v. *United States*, 162 U. S. 613 ..... 18, 20, 21
Wilson v. *United States*, 221 U. S. 361 ..... 39, 49

Constitutions and Statutes: Page

Constitution of the United States, Fifth Amendment 17, 18
Act of February 25, 1868, 15 Stat. 37 (R. S. 860), repealed by Act of May 7, 1910, c. 216, 36 Stat. 352 ..... 24, 44
Bankruptcy Act, Act of July 1, 1898, c. 541, sec. 7, 30 Stat. 544; 11 U. S. C. 25 ..... 17, 21, 24
Criminal Code, Sec. 215, 18 U. S. C. 338 2
18 U. S. C. 582 10
New York Constitution, Art. 1, Sec. 6 16
New York Civil Practice Act, Sec. 789, L. 1935, c. 630 ..... 2, 16, 25
New York Consolidated Laws (Cahill):
C. 21:
Sec. 359 37
C. 41:
Sec. 921 17
Sec. 925 17
Sec. 932 17
Sec. 938 17
Sec. 2446 28
New York Laws, 1938, c. 108, sec. 17 ..... 3, 25
New York Penal Law, sec. 1292a 17
Bankrupt Law Consolidation Act of 1849, 12 & 13 Vict., c. 106 41

Miscellaneous:
Attorney General's Annual Report for 1909 44
45 Cong. Rec. 2251–2253 45
45 Cong. Rec. 5764–5765 45
H. Rep. No. 266, 61st Cong., 2d sess 45
Model Code of Evidence (American Law Institute, 1942) 46
S. Rep. No. 502, 61st Cong. 2d sess 45
William Howard Taft, *The Administration of Criminal Law*, 15 Yale L. Journ. 1 46
3 Wigmore, *Evidence*, 3d ed. 1940, p. 310 42
8 Wigmore, *Evidence*, 3d ed. 1940:
p. 363 40
Sec. 2258 18
Sec. 2259 49
Sec. 2260 ..... 26, 27
Sec. 2268 26
Sec. 2271 27
Sec. 2276 18

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 46–56) and dissenting (R. 56–58) opinions in the circuit court of appeals are reported at 136 F. (2d) 394.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 24, 1943 (R. 59–60). The petition for a writ of certiorari was filed on July 23, 1943, and was granted on October 11, 1943 (R. 62). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the admission in evidence against petitioner at the trial below of his testimony in New York supplementary proceedings in which he was examined as a judgment debtor was a violation of his constitutional privilege against self-incrimination.[1]

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 789 of the New York Civil Practice Act (L. 1935, c. 630), prior to March 14, 1938, provided:

---

[1] In the petition for a writ of certiorari four other alleged bases for reversible error were advanced, but this Court in granting the writ limited its consideration of the case to the single question stated in the text (R. 62).

> A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * *. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination.

Effective as of March 14, 1938 (L. 1938, c. 108, sec. 17), this statute was amended so as to provide also that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise."

STATEMENT

On August 20, 1940, petitioner was indicted, in the District Court of the United States for the Southern District of New York, on nine counts charging him with having used the mails in execution of a scheme to defraud two classes of persons, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 1–7).[2] Seven counts

[2] The present printed record is in greatly abbreviated form. However, nine copies of the printed record in the circuit court of appeals were supplied to this Court in connection with the petition for certiorari. In our references the former is designated "R."; the latter "Tr.".

were submitted to the jury (Tr. 1473–1476).[3] Petitioner was found guilty on all of them (Tr. 1509), and he was sentenced to five years' imprisonment on each, the sentences to run concurrently (R. 8, 43).[4] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 46–56, 59–60), one judge dissenting (R. 56–58).

Petitioner did not take the witness stand at the trial, and he contends that the admission in evidence against him of his testimony, given in New York supplementary proceedings in aid of his judgment creditors, on various occasions between March 31, 1936, and September 29, 1939 (R. 12–43), was in effect the equivalent of wringing it from his own lips at the trial within the meaning of the privilege against self-incrimination provided by the Fifth Amendment (Br., pp. 32–33). In order to appraise this contention in the light of the relation of the challenged testimony to the case, we shall set forth at some length the nature of the charges against petitioner and the evidence adduced in support thereof.

The scheme to defraud with which petitioner was charged consisted of "kiting" checks, described by Government witness Robinson as "a

[3] A verdict was directed for petitioner on counts 2 and 4, for the reason that they were based on the same mailings as counts 1 and 3 (Tr. 1475–1476, 474–475).

[4] On two counts, however, the sentence was suspended and petitioner was placed on five years' probation, to begin at the end of the service of his sentences on the other counts (R. 8, 43).

scheme whereby checks are drawn against insufficient funds and the delay in clearing [one] check is taken advantage of by cashing a[nother] check within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (Tr. 1166).[6] The two classes of petitioner's intended victims were (1) those whom he would induce to cash checks for him, and (2) those whom he would induce to sign checks in blank and deliver to him (R. 1). While nine victims of the first class were named in the indictment (R. 1) and about 102 more in the Government's bill of particulars (Tr. 14y–14dd), the only mailings alleged with respect to this class of intended victims related to petitioner's transactions with the Essex House (R. 3–4), a New York apartment hotel. Edwin S. Reynolds was the only named victim of the second class (R. 1). Since the only mailings charged were in furtherance of the Essex House and Reynolds transactions (R. 3–7), it was upon these transactions that the Government's case rested. Transactions with other alleged victims (including those with

[6] The meaning of the term "kite" in banking parlance is similarly described by Government witness Moore (Tr. 435–437). That check "kiting," when involving use of the mails, constitutes a violation of the mail fraud statute, see *Federman* v. *United States*, 36 F. (2d) 441 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Lowe* v. *United States*, 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717.

Stout & Co., to which most of petitioner's discussion of the relevance of his testimony given in the New York supplementary proceedings after March 14, 1938, is addressed, see Br., pp. 17–23) were significant only insofar as they constituted a part of the same scheme to defraud, or provided evidence of the fraudulent intent with which petitioner's transactions with the Essex House and Reynolds were conducted.[6]

Between October 1935 and October 1936, although living in New York, petitioner maintained a bank account in his own name at the Emmett County State Bank in Harbor Springs, Michigan (R. 12, 32). He frequently cashed checks for large amounts drawn on this account without having funds therein to meet them (Tr. 49–50). They were covered by the cashing of additional checks and wiring of the proceeds in the necessary amount to the bank (Tr. 52, 54, 57–58).[7] On August 10, 1936, when a $5,000 check arrived at the bank with only $147.67 in the account to cover it, the cashier by telephone asked petitioner to close out the account (Tr. 48–53). After the account was closed, checks written by petitioner continued awhile to come in and were protested for nonpayment (Tr. 52, 59–60).

---

[6] The trial court so instructed the jury (Tr. 1485–1486).

[7] The Government witness Clarke, cashier of the Emmett County State Bank, testified: "The check would come through the mails in the morning and the check to pay it, the Western Union draft, would be deposited before three

Upon being asked to close out the account in the Emmett County Bank, petitioner, on August 26, 1936, personally opened an account in the name of his father, J. Feldman, of Petoskey, Michigan, in the First National Bank of Petoskey (hereinafter called the Petoskey Bank). When the cashier objected to opening the account for the reason that the bank had had prior experience with checks of J. Feldman drawn on insufficient funds and did not consider him a good credit risk, petitioner stated that he was well able to give his father financial assistance and would guarantee the account, which was thereupon opened with an initial deposit of $1,000 in currency. (Tr. 61–62, 71, 74.) On September 15, 1936, J. Feldman executed an authorization giving petitioner and Alfred B. Frank, who was J. Feldman's son-in-law and bookkeeper (Tr. 156–157), access to the account to the extent of securing information as to its state (Gov. Ex 13, Tr. 65, 1527).

Although thus representing himself in August 1936 as a man of means, petitioner on March 31, 1936, in New York supplementary proceedings brought against him as a judgment debtor, had testified under oath that he was not then employed and never had been employed; that he had no independent income and no business of his own and owned no stocks, bonds, or securities; that he lived on money supplied by members of his

family; and that unpaid judgments against him totaled $150,000 (R. 12–13). In further proceedings of the same character he testified, on October 28, 1936, that he had been in the fur business, but since that business had been bad of late he had virtually given up all fur contacts; that he lived on money borrowed from friends and from his father, brothers, and sisters, who were "fairly wealthy"; and that there were 125 judgments outstanding against him totaling about $340,000 (R. 31–32; Tr. 1288, 1613–1615). By his own admissions, petitioner's judgment debts thus had increased by almost $200,000 between March and October 1936.

From shortly after the opening of the Petoskey Bank account until August 21, 1937 (the period covered by petitioner's transactions with the Essex House), and thereafter from September 1938 until April 1939 (the period covered by his transactions with Stout & Co.), petitioner operated a check "kite" between New York City and the Petoskey Bank (Tr. 1165–1232, 1274–1278). His father would sign checks in blank in Petoskey and mail them to petitioner in New York, where petitioner would fill in the date, payee's name, and amount (Tr. 160; Gov. Ex. 102–B–C, R. 36–39). Between January 1 and August 21, 1937, petitioner cashed these checks in New York in the total amount of $910,842.25 (Tr. 1154). Of this amount $805,593.94 represented checks cashed by the Essex House (Tr. 498, 1170–1177). At no time did the

balance in the Petoskey Bank account equal or exceed the amount of checks drawn and outstanding against it (Tr. 1177–1178). The drawing of each check was predicated upon petitioner's "being able to cash another check and wire the funds to cover the check drawn" (Tr. 1165). The successful operation of the "kite" was predicated in part upon the time factor of four or five days that it took for a check to clear between New York and Petoskey, passing through the Chicago Federal Reserve Bank (Tr. 72, 109, 121, 431–432, 467, 483–484, 1166–1167). When checks were about to arrive at the Petoskey Bank for payment petitioner would communicate by wire or telephone with Alfred Frank, or with the bank, in order to ascertain the amount needed to cover, and would then transmit by wire the proceeds of another check, or a part thereof, to Frank for deposit in the account (Tr. 78, 110–111, 169–171, 173, 176, 194–195, 203, 280–283, 298–299, 304–307, 377). The total amount transmitted by wire between January 1 and August 21, 1937, was $860,930, as against $910,842.25 of checks cashed (Tr. 1159).

Although the Essex House transactions did not reach their peak until August 1937,* petitioner had admitted, in testimony sworn to in New York supplementary proceedings on July 21, 1937, that "I

*During the first 21 days of August checks totaling $141,157.09 were cashed for petitioner by the Essex House (Tr. 1177).

am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. * * * I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one"; that he had been "kiting" for seven months; that he had torn up Western Union receipts for money wired, so as "not to have people know what I am doing"; and that he intended to file a petition in bankruptcy immediately (Gov. Ex. 102-B-C-D-E, Tr. 1287, R-36-43). Although thus intending on July 21 to file a petition in bankruptcy "immediately," he proceeded in the first 21 days of August to draw on insufficient funds checks totaling $150,900 (Tr. 1177).

When on August 21, 1937, the Essex House ceased cashing checks for him, there were in transit to Petoskey for payment 9 checks cashed by it between August 16 and August 20, totaling $30,700 (Tr. 1180). The balance in the Petoskey Bank at the time was $0.24 (Tr. 1178). The 9 checks totaling $30,700 were protested for non-payment (Tr. 480-483). Checks in this group were the subject matter of the mailings of August 20 and 21 alleged (R. 3-4) and proved (Tr. 468-475) under counts 1-4 of the indictment.*

---

* On earlier mailings the applicable three-year statute of limitations (18 U. S. C. 582) had run at the time the indictment was filed on August 20, 1940 (R. 1).

A few days thereafter petitioner telephoned Edwin S. Reynolds at Dayton, Ohio (Tr. 596–598), and at petitioner's request Reynolds signed in blank and mailed to petitioner a number of checks on his account in the Winters National Bank and Trust Co. of Dayton, telling petitioner that there was no money in the account and that he should not cash the checks without sending funds to cover them (Tr. 598–601, 663, 667–669). Petitioner, however, filled out four of them, two for $6,000 each and two for $10,000 each, and got William Erb, a broker employed by the New York Stock Exchange firm of Munds, Winslow & Potter, to cash them (Tr. 551–553, 569–577; Gov. Exs. 59–A–B–C, 60–A–B–C, 62, 63, Tr. 589, 573, 1552, 1554). With the proceeds, he took up the $30,700 of unpaid checks cashed by the Essex House (Tr. 1181–1187).

The Reynolds checks were protested for non-payment (Tr. 553, 577–578). They were the subject matter of the mailings of August 23, 25, 26, 27, and 28 alleged (R. 5–7) and proved (Tr. 581–589) under counts 5–9. Erb and Munds, Winslow & Potter, were reimbursed, for the $32,000 given petitioner on the Reynolds checks, by Reynolds' mother, who received from petitioner two notes for $12,000 and $20,000, respectively (Tr. 673–680; Gov. Ex. 86, Tr. 680, 1580; Def. Ex. N, Tr. 1411, 1634). The first was subsequently returned by Reynolds to petitioner (Tr. 1410–1412); the

second, although reduced to judgment, remains unpaid (Tr. 690–691, 695–696, 699–700).

Petitioner's subsequent transactions with Stout & Co. between September 1938 and April 1939 (Tr. 715–984, 1193–1206, 1274–1278) were essentially similar to those with the Essex House. They resulted in a loss to Stout & Co. of $81,500 and the liquidation of that firm (Tr. 770–772).

As we have previously shown (*supra*, pp. 5–6), the Stout & Co. transactions involved no mailing charged in the indictment, and for this reason the jury was correctly instructed (footnote 6, *supra*, p. 6) that a conviction could not be based upon such transactions.

The character of petitioner's testimony given in the New York supplementary proceedings conducted between October 1938 and September 1939 (R. 13–31, 33–35) is set forth in Point II of the Argument, *infra*, pp. 25–35.

SUMMARY OF ARGUMENT

1. Petitioner's testimony given in the New York supplementary proceedings must be divided into two parts, that given before and that given after March 14, 1938, the date on which an immunity statute sufficient to justify the compulsion of otherwise incriminating testimony in the supplementary proceedings first became effective. The earlier testimony is the only part that was incriminating. With respect to it, however, since it was incriminating under state as well as federal law,

and since there was no effective immunity statute, the state privilege would have fully protected petitioner from compulsory disclosure to the state of the incriminating facts; yet with the privilege available, and though represented by counsel, he nevertheless failed to claim it in the state proceedings, and must therefore be deemed to have given the testimony voluntarily. For this reason alone its admission in evidence at the trial below was proper and does not present a question of the admissibility at a federal criminal trial of testimony previously given by the defendant under the compulsion of a state immunity statute.

2. The same is true of the testimony given after March 14, 1938, although for a different reason. That testimony was not incriminating and therefore evoked no privilege against self-incrimination. Furthermore, its effect at the trial was, at the most, merely cumulative, in relation both to the earlier testimony and to the other evidence in the case; and as the majority below held (R. 49–50, 54), petitioner could not have been prejudicially affected by the later testimony alone.

3. Even assuming, however, that all of petitioner's testimony in the New York supplementary proceedings was given under the compulsion of an immunity statute, it was nonetheless admissible in evidence at the trial below. The prior decision of the court below in *Fuller* v. *United States,* 31 F. (2d) 747 (C. C. A. 2), certiorari denied, 280

U. S. 556, is directly in point. That decision in turn was but an application of principles established by decisions of this Court. As applied to a criminal defendant the federal privilege against self-incrimination is satisfied if no federal process compels him to testify or to produce incriminating evidence. Here, moreover, the prior compulsion in the state proceedings was lawfully exerted, with the result that the challenged testimony does not carry even the taint of unlawful state or private action that this Court has held does not preclude the admission of relevant evidence. No suggestion of collusion between the United States Attorney and petitioner's judgment creditors, who instituted the state proceedings, is present in this case; and the possibility of one being trapped "between the interstices of the overlapping state and federal sovereignties," to which the dissenting judge below alludes (R. 57), is in no sense the unique result of an immunity statute. Petitioner in fact is seeking to attribute to an immunity statute a result which, if achieved, would logically extend to situations where no immunity statute is either involved or necessary to secure the testimony, and from which it would follow that the admission in evidence against a criminal defendant of testimony previously given by him in another proceeding is to be regarded as the equivalent in all respects of compelling him presently to testify and therefore never permissible. Petitioner's

contention, if sustained, would cast doubt upon the admissibility in evidence against criminal defendants of various classes of legally required reports, such as income-tax returns, which, like the recorded evidence here involved, are of exceptional trustworthiness; and it would exalt the privilege against self-incrimination, without justification in reason or authority, to a hitherto unattained pinnacle, at the expense of the public interest in the proof of crime by trustworthy evidence legally procured.

ARGUMENT

I

PETITIONER'S INCRIMINATING TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS PRIOR TO MARCH 14, 1938, WAS VOLUNTARY ON HIS PART AND AS SUCH ADMISSIBLE AT HIS TRIAL

The petition for certiorari, and indeed the majority and dissenting opinions below, proceed on the assumption that all of petitioner's testimony in the New York supplementary proceedings was given under the compulsion of a state immunity statute. However, no immunity statute was applicable to the testimony given prior to March 14, 1938, and that testimony included petitioner's only damaging admissions.[10]

---

[10] As shown in the Statement (*supra*, pp. 9–10) petitioner, by his testimony given in the supplementary proceedings in July 1937, convicted himself out of his own mouth of having been engaged, for a period of seven months immediately preceding the first of the transactions charged in the indict-

Prior to March 14, 1938, Section 789 of the New York Civil Practice Act (*supra*, pp. 2–3) did not purport to confer immunity from prosecution, but merely provided that the testimony could not be used against the witness in a subsequent criminal proceeding.[11] In this form it was not an immunity statute, and therefore the state constitutional privilege of refusal to answer continued to prevail.[12] The testimony given by petitioner prior to March 14, 1938, was incriminating of fraud under state as much as under

---

ment, in the same check "kiting" scheme of which the transactions charged were in furtherance. The entirely different character of the testimony given after March 14, 1938, is discussed in Point II (*infra*, pp 25–35).

[11] Petitioner concedes (Br., pp. 9–11, 24) that the bar of the statute against the subsequent use of the testimony, and its later amendment granting immunity (effective March 14, 1938), would apply only to proceedings in the courts of New York.

[12] The privilege against self-incrimination is provided by Art. 1, Sec. 6, of the New York Constitution. Although originally holding that a statute banning subsequent use of the incriminating testimony in a criminal prosecution of the witness was sufficient to justify compulsion of such testimony (*People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74 (1861)), New York has long followed *Counselman* v. *Hitchcock*, 142 U. S. 547, in holding that such a statute is insufficient because it does not protect the witness from a derivative use of the testimony, and that therefore the privilege may be invoked despite the statute, *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903); *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 229 (1894); *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940, 948 (Extraordinary Trial Term, Erie County, 1922); see *Matter of Doyle*, 257 N. Y. 244, 251 (1931).

federal law.[13] He therefore could have made a claim of privilege with the right to have it recognized, on the basis of incrimination under state law.[14] The privilege against self-incrimination is waived by failure to claim it,[15] and petitioner, although at least part of the time represented by counsel in the New York proceedings (R. 21, 41), made no claim of privilege or other objection to the questions that elicited the incriminating answers (see R. 12–13, 31–32, 36–43). It follows that the testimony given prior to March 14, 1938,

---

[13] See New York Consolidated Laws (Cahill), c. 41, secs. 921, 925, 932, 938, and New York Penal Law, sec. 1292a. Petitioner asserts that even his testimony given after March 14, 1938, was incriminating under these provisions (Br., p. 22), and must therefore concede their application to the far more damaging testimony given prior to that date.

[14] Cases cited *supra*, footnote 12; cf. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73, holding that Section 7 of the Bankruptcy Act (Act of July 1, 1898, c. 541, sec. 7, 30 Stat. 544, 548; 11 U. S. C. 25), which is similar to the New York statute here involved as it stood prior to March 14, 1938, does not render inapplicable to a debtor's examination in bankruptcy the privilege of refusal to answer provided by the Fifth Amendment; *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[15] *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *People* v. *Johnston*, 228 N. Y. 332, 340 (1920); *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y 127, 138 (1865); see, also, *United States* v. *Monia*, 317 U. S. 424, 427; *People* v. *Cassidy*, 213 N. Y. 388, 395 (1915).

must, in contemplation of law, be deemed to have been entirely voluntary.[16]

Petitioner seeks to avoid this conclusion by arguing (Br., pp. 23–26) that since admittedly in the state proceedings he could claim no federal privilege,[17] an attempted assertion of such a privilege would have been a futile gesture, and that therefore his failure to make such a gesture cannot be regarded as a waiver of his rights under the Fifth Amendment. This argument, however, rests upon an artificial and, we submit, wholly fallacious attempt to dissect petitioner's privilege into separate federal and state aspects. In truth, petitioner had just one privilege: the privilege not to be compelled to incriminate himself.[18] As

---

[16] *Wilson* v. *United States*, 162 U. S. 613, *infra*, pp. 20–21; *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2276.

[17] The privilege against self-incrimination as provided by the Fifth Amendment, of course, has no application to the states. *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597; *Twining* v. *New Jersey*, 211 U. S. 78, 93; cf. *Palko* v. *Connecticut*, 302 U. S. 319.

[18] The privilege applies only to answers incriminating under the laws of the jurisdiction exercising the compulsion. *United States* v. *Murdock*, 284 U. S. 141, 149; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438 (1926); *Gould* v. *Gould*, 201 App. Div. 674, 194 N. Y. S. 742 (1922); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2258, pp. 337–341. The answers in this case were incriminating under such laws; see footnote 13, *supra*.

we show below (*infra*, pp. 40–43), the introduction of petitioner's testimony in evidence in the criminal proceeding involves in itself no element of testimonial compulsion. Petitioner's case, even on his own argument, must rest upon the fact that such testimony was initially procured by compulsion. But if, when petitioner testified in the state proceedings, he was under no obligation so to do, but could assert a privilege to refuse, whether bottomed on the state constitution or on any other charter of liberties, then there was no compulsion. Regardless of the source of the privilege, the fact remains that petitioner testified when he was under no legal obligation to do so.

As to this portion of the testimony, therefore, we submit that the New York statute has no relevance, either prior or subsequent to its amendment, and that the admissibility of the testimony is governed by the same rule as that applicable to any ordinary witness who is entitled to assert a privilege against self-incrimination and fails to do so. The rule has been generally stated, "that if a defendant in a criminal case has testified in some other proceeding, such testimony may be used against him as an admission."[19] Under this rule testimony given before a grand jury or coroner's inquest, or in insolvency proceedings, has been held to be admissible against the giver

[19] *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893 (C. C. A. 10), certiorari denied, 285 U. S. 549.

at his subsequent criminal trial.[20] In *Wilson* v. *United States*, 162 U. S. 613, this Court held in a capital case that the testimony of the defendant, given before a United States Commissioner at a preliminary hearing, was admissible against him at his trial although he had not been represented by counsel or informed of his privilege against self-incrimination at the time he gave it.[21] As to

---

[20] *Commonwealth* v. *MacKenzie*, 211 Mass 578, 580 (1912); *People* v. *Wieger*, 100 Cal. 352, 358 (1893); *Hendrickson* v. *People*, 10 N. Y. 13, 27–28 (1854); *Abbott* v. *State*, 75 N. Y. 602 (1878); *State* v. *Robinson*, 32 Ore. 43, 51 (1897); *Williams* v. *Commonwealth*, 29 Pa. 102, 105 (1857); *Milton* v. *United States*, 110 F. (2d) 556, 559–560 (App. D. C.); *Boitano* v. *United States*, 7 F. (2d) 324, 325 (C. C. A. 9); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.): "The Fifth Amendment affords no immunity to a witness against the use of his voluntary testimony against him." Where a motion to suppress evidence on the ground of alleged illegal search and seizure has been properly denied, the motion papers are admissible at the trial on the issue of ownership of the property that had been seized. *Kaiser* v. *United States*, 60 F. (2d) 410, 413 (C. C. A. 8), certiorari denied, 287 U. S. 654; in accord, *State* v. *Williams*, 69 Oh. App. 361 (1941), appeal dismissed, 139 Oh. St. 172 (1941) (stenographic notes of cross-examination of defendant at hearing on motion to suppress evidence held admissible against him at his trial); but compare *Safarik* v. *United States*, 62 F. (2d) 892, 897–898 (C. C. A. 8), rehearing denied, 63 F. (2d) 369 (C. C. A. 8) (motion papers held inadmissible at trial on issue of ownership where motion to suppress had been sustained on the ground that the search and seizure by federal officers were in fact illegal).

[21] Following *Wilson* v. *United States*, see also *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2) (testimony by the defendant given as a witness called by the prosecution at the trial of an asso-

the testimony given prior to March 14, 1938, we see no material distinction between the facts of that case and of this.

Petitioner seeks to distinguish the *Wilson* case on the ground that there was there "no question of overlapping and different jurisdictions nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, waives it." (Br., p. 25). But this statement points to no distinction. There, as here, whatever privilege the defendant had, he waived. That the privilege which he waived in the present case was afforded him by the state constitution rather than by the federal Constitution cannot be material;[22] in both cases, in fact and in law, his testimony was voluntary.

Petitioner relies upon *Clark* v. *State,* 68 Fla. 443, 436 (1914), which holds without discussion that the admission in a state criminal trial of testimony given by the defendant pursuant to Sec-

---

ciate, though under arrest at the time and not warned of his privilege, held admissible against him).

[22] The pungent comment of the dissenting judge below (R. 57) as to the wish "to trap persons between the interstices of the overlapping state and federal sovereignties" loses its aptness when it is recognized that he, like the majority of the court below, mistakenly assumed that the testimony was given under a state immunity statute.

tion 7 of the Bankruptcy Act (11 U. S. C. 25), in an involuntary bankruptcy proceeding, constitutes a violation of the state constitutional privilege against self-incrimination, in that it amounts to "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself."[23] This decision, while concededly supporting petitioner's position, was obviously ill-considered. Section 7 of the Bankruptcy Act provides merely that the bankrupt's testimony shall not be "offered in evidence against him in any criminal proceeding",[24] and does not purport to provide immunity from prosecution. It therefore does not satisfy the demands of the constitutional privilege, which applies in bankruptcy pro-

[23] Of course, the use against a criminal defendant of his own prior admission, whether given in or out of court, may in a sense be said, in every case, to amount to causing him "indirectly at least" to accuse himself. But the privilege against self-incrimination has never been thought to require the abolition in criminal proceedings of the well-settled exception to the hearsay rule that is made for *admissions*. As the court of appeals of Kentucky has aptly said, "The sincerity with which appellant argues this ground is the only excuse meriting its consideration. Of course, this constitutional privilege means that one accused cannot be compelled to give testimony against himself. It does not cover the case where the accused voluntarily makes admissions in or out of court." *Turner* v. *Commonwealth*, 227 Ky. 520, 525 (1929).

[24] Presumably the prohibition applies only to federal criminal proceedings. Cf. *Ensign* v *Pennsylvania*, 227 U. S. 592. In the exercise of the bankruptcy power Congress conceivably might validly prohibit the use of the testimony in state courts.

ceedings despite the statute.[35] Testimony given in bankruptcy proceedings without a claim of privilege thus is legally voluntary, just as is the testimony with which we are here concerned. It follows that *Clark* v. *State*, if consistently applied, would establish a principle by which the receipt in evidence in a criminal case of any prior admission by the defendant would be regarded as compelling him "indirectly at least" to be a witness against himself.[36] Such a principle would completely abrogate the application to criminal proceedings of a well-recognized exception to the hearsay rule, and clearly is not the law. The sweeping character of the court's decision on the facts before it therefore weakens the authority of *Clark* v. *State* as a precedent in support of petitioner's position here.[37]

---

[35] *Arndstein* v. *McCarthy*, 254 U. S. 71, 73; cf. *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[36] See footnote 23, *supra*.

[37] Petitioner states (Br., p. 11) that the majority below "argued that the *Clark* case was not controlling because it presented the converse of the situation at bar." It seems doubtful, however, whether the majority relied on this distinction in disregarding the *Clark* case. The majority said only that it was "not convinced that this decision should control determination of the case at bar" (R. 51). It seems more probable, as implied by the dissenting judge (R. 57), that the majority weighed on its merits the doctrine of the *Clark* case and rejected it as unsound.

State v. *Verecker*, 124 Me. 178 (1924), also cited by petitioner (Br., pp. 9, 13, 29), is of little help to him. While suggesting in *dictum* a possible rule of comity, the court there affirmed the conviction on the ground that the admission

Since petitioner was not in fact compelled to make the incriminating admissions contained in

---

of compelled prior testimony was not in any event prejudicial when the defendant had orally given the same testimony on the stand as a witness in his own defense.

Petitioner might also have cited *State* v. *Drew*, 110 Minn. 247, 251–253 (1910), which holds that the introduction, in a state criminal trial, of schedules of assets and liabilities filed by the defendant pursuant to Section 7 of the Bankruptcy Act, in an involuntary bankruptcy proceeding, constitutes a violation of his constitutional privilege against self-incrimination. The court relied upon two federal decisions which held, however, merely that such schedules were protected from use in other federal proceedings by virtue of Section 860 of the Revised Statutes, repealed in 1910 (36 Stat. 352) (for the significance to the present case of this statute and its repeal, see *infra*, pp. 44–46). *Johnson* v. *United States*, 163 Fed. 30 (C. C. A. 1); *Cohen* v. *United States*, 170 Fed. 715 (C. C. A. 4). *State* v. *Drew*, moreover, is directly *contra* to *Commonwealth* v. *Ensign*, 228 Pa. 400 (1910), affirmed in *Ensign* v. *Pennsylvania*, 227 U. S. 592, where this Court held (p. 599) that it is "only the testimony given upon the examination of the bankrupt under clause 9 [of Section 7] that is prohibited from being offered in evidence against him in a criminal proceeding" and not the schedules filed pursuant to clause 8. For holdings that such schedules as distinguished from the bankrupt's testimony are admissible in federal criminal proceedings, see *Slakoff* v. *United States*, 8 F. (2d) 9, 10 (C. C. A. 3); *Optner* v. *United States*, 13 F. (2d) 11, 12–13 (C. C. A. 6); *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893–894 (C. C. A. 10), certiorari denied, 285 U. S. 549. Since Section 7 is not an immunity statute, as to either schedules or testimony (*Arndstein* v. *McCarthy*, 254 U. S. 71), it follows that in a state criminal trial any testimony voluntarily given without a claim of privilege in the bankruptcy proceeding can have no greater sanctity than the schedules, unless by virtue of a possible application to state as well as federal proceedings of the provision of clause 9 prohibiting the subsequent use of the testimony. Such protection as is

his testimony given prior to March 14, 1938, we submit that no circumstances exist to justify, with respect to such testimony, departure from the general rule whereby admissions made in testimony given in other proceedings are receivable in evidence against a criminal defendant.

II

PETITIONER'S TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS AFTER MARCH 14, 1938, WAS NOT IN FACT INCRIMINATING AND WAS THEREFORE NOT PRIVILEGED, AND ITS ADMISSION AT HIS TRIAL WAS NOT PREJUDICIAL

Effective March 14, 1938, Section 789 of the New York Civil Practice Act was amended [28] so as to make it a true immunity statute, broad enough to legitimatize compulsion of petitioner's testimony without infringing his privilege not to be forced to incriminate himself. We contend, however, that his testimony given after March 14, 1938, was not in fact incriminating, and that therefore it evoked no privilege which he could assert either in the state proceedings or in the instant criminal case, even in the absence of an immunity statute. As a result, we submit, the later testimony—like the earlier, although for a different reason—was not in fact given under the protection of any immunity statute, and was admissible.

---

afforded to the testimony after it is given derives solely from the statute and not from any state or federal constitutional privilege.

[28] Laws, 1938, c. 108, sec. 17 (*supra*, p. 3).

Petitioner suggests (Br., pp. 17–19) that the incriminating character of the testimony must be deemed concluded by the fact that the Government introduced it in evidence against him at the criminal trial. This argument, however, proves too much. Its consequence would be that the extent of the privilege available at a hearing to which an immunity statute applies would be tested not by the rules applicable to an ordinary witness, but by those applicable to a defendant already charged with a specific crime. The witness would in effect have the privilege of a criminal defendant, not merely to refrain from incriminating himself, but not to be called upon to testify at all, to any facts.[29] As this Court said in *Heike* v. *United States,* 227 U. S. 131, 141, dealing with a similar claim: "At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play." In fact, a logical consequence of the argument would be to exclude all prior admissions of a defendant from evidence at his trial for crime, regardless of the circumstances under which the admissions were made. This is not, and should not be, the law.

Rather, we submit, the incriminating character of petitioner's testimony is to be determined in the light of the conditions existing at the time the testimony was given, and by the rules applicable

[29] 8 Wigmore, *Evidence* (3d ed. 1940), secs. 2260, 2268.

to an ordinary witness called upon to testify in a judicial proceeding. Such a witness has no privilege against testifying merely because his testimony may possibly have some remote relevance to a later criminal charge. All kinds of testimony considered by no one to be incriminating when given, and therefore not privileged, may subsequently provide background material for proof of crime. To be privileged, and therefore protected by an immunity statute when given, the testimony must constitute an essential link in the proof of crime, or give "reasonable ground to apprehend danger to the witness from his being compelled to answer."[30] Otherwise, an immunity statute

[30] That such characteristics are essential to render privileged the answers of a witness not charged with crime, see *Regina* v. *Boyes*, 1 Best & S. 311, 321 (1861); *Aaron Burr's Trial*, Robertson's Rep. I, 208, 244, 25 Fed. Cas. No. 14,692e at 38–39 (1807); *State* v. *Thaden*, 43 Minn. 253, 255–256 (1890); *Mason* v. *United States*, 244 U. S. 362, 364–366; *Matter of Doyle*, 257 N. Y. 244, 267 (1931); *People* v. *Kramer*, 14 N. Y. S. (2d) 161, 163 (Appellate Division, Fourth Department, 1939); *People ex rel. Coyle* v. *Truesdell*, 18 N. Y. S. (2d) 947, 951 (Appellate Division, Second Department, 1940); 8 Wigmore, *Evidence* (3d ed. 1940), secs. 2260, 2271.

In *Heike* v. *United States*, 227 U. S. 131, 144, where the non-incriminating character of the testimony was determined retroactively, after the criminal proceeding had been instituted, Mr. Justice Holmes said of the immunity statute there involved: "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law."

would confer a sweeping immunity from criminal prosecution upon a witness who so much as opened his mouth in a proceeding to which the immunity statute applied. This danger is particularly apparent where the immunity statute, as is the case here, does not require that the immunity be claimed and granted as a condition precedent to its being secured.[21]

Accordingly, we submit that the question whether petitioner's testimony given after March 14, 1938, was in fact incriminating, and as such compellable only by virtue of the state immunity statute, is to be determined as of the time the testimony was given. And we submit that there is nothing in petitioner's testimony given after March 14, 1938, that could, as of the time it was

---

[21] Cf. *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940 (Extraordinary Trial Term, Erie County, 1922). Section 2446 of the Penal Law (Consolidated Laws of New York (Cahill), c. 41, § 2446) provides for written waivers of the benefits of any immunity statute in New York; but of course a witness does not acquire an immunity unless he gives incriminating testimony. *People ex rel. Bekoris* v. *Triesdell*, 21 N. Y. S. (2d) 7 (App. Div., Second Department, 1940); *People* v. *Lorch*, 13 N. Y. S. (2d) 155, 160–161 (Court of General Sessions, New York County, 1939).

The principle that under such statutes the immunity need not be claimed should not be confused with the principle, relied on in our argument under Point I (*supra*, pp 16–18), that, absent a true immunity statute, the privilege must be claimed or is deemed to have been waived. See *United States* v. *Monia*, 217 U. S. 424, 427.

given, reasonably have been deemed to be incriminating, either under New York or federal law.[32] Nothing therein admitted, directly or indirectly, the commission of any criminal offense, or provided any necessary element or link in the proof thereof.[33] Nothing therein provided reasonable ground for apprehension of a criminal proceeding being instituted;[34] and petitioner does not suggest that the institution of the present proceeding was the result, either directly or indirectly, of his testimony given in the New York supplementary proceedings.[35] All the later testimony (that given

[32] Since the state privilege against self-incrimination has no application to incrimination of a federal offense alone (see cases cited in footnote 18, *supra*, p. 18), it would seem that technically the only question was whether such testimony was incriminating under New York law. However, even if it were held that testimony incriminating under federal law but given in a state proceeding was inadmissible in a later federal criminal case, petitioner would not be aided since, as we show in the text, the testimony given after March 14, 1938, was not incriminating under either state or federal law.

[33] See *People ex rel. Coyle* v. *Truesdell*, 18 N. Y. S. (2d) 947, 951 (Appellate Division, Second Department, 1940), and other cases cited in footnote, 30, *supra*, p. 27.

[34] See *People* v. *Kramer*, 14 N. Y. S. (2d) 161, 163 (Appellate Division, Fourth Department, 1929), and other cases cited in footnote 30, *supra*, p. 27.

[35] Cf. the comment of this Court, in *United States* v. *Murdock*, 284 U. S. 141, 149, dealing with the converse situation: "The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters."

after March 14, 1938) shows is that he was without means of his own and lived entirely on money borrowed from his father and other members of his family or from friends; that his father paid the rent for his apartment and sent him checks drawn on the First National Bank of Petoskey, Michigan; that he had never sent money or checks to his father's account in Petoskey;[36] that in 1935 and 1936 he had maintained a brokerage account with Harriman & Keech in the name of Joseph Little, and that in 1937 he had maintained another brokerage account with Munds, Winslow & Potter that resulted in an $8,000.00 loss; that between January and April of 1939 he was in Florida; that while there he lived and had his meals in the office suite of Stout & Co., which paid all his expenses; that he was there as a friend of Miller, a partner in the firm; and that he had no business transactions while in Florida (R. 13–31, 33–35).

His testimony that he had no funds or property of his own and lived entirely on borrowed money

---

[36] A part of this testimony was inconsistent both internally and with other evidence in the case, and may well have amounted to perjury on the part of petitioner. But it was not introduced for the purpose of showing perjury; and in any event it would not in that aspect have fallen within the scope of the state immunity statute. *People* v. *Reiss*, 8 N. Y. S. (2d) 209 (Appellate Division, First Department, 1938), affirmed 280 N. Y. 539 (1939); *People* v. *Kramer*, 14 N. Y. S. (2d) 161 (Appellate Division, Fourth Department, 1939); cf. *People* v *Keylon*, 122 Cal. App. 408, 412–413, 10 P. (2d) 86, 87 (1932).

showed at the most a financial motive for the criminal conduct charged against him. Yet if for this reason alone it is to be deemed incriminating, it would follow that any one of millions of individuals could secure immunity from prosecution for crimes of fraud, larceny, or robbery, by merely testifying to indigence and dependence in judgment debtor proceedings such as those here involved. His testimony that he at one time maintained a brokerage account in the name of Joseph Little, credit manager of the Essex House, in no way proved any element of a crime charged against him, but merely indicates his closeness to Little, a point emphasized by petitioner himself at the trial in disproof of the charges against him involving the Essex House. His testimony that he spent a winter in Florida as the guest of Stout & Company likewise contains not the slightest suggestion of a fraud upon that concern, but merely indicated his friendship with a partner therein, a point also emphasized by him at the trial in disproof of the charge of fraud. (This is illustrated by his statement in the brief on the merits that the alleged knowledge of the victims made each of them "a willing participant with the defendant in the transactions." (Br. pp. 4–5.) His testimony that his father sent him checks drawn on the First National Bank of Petoskey, Michigan, contains not the slightest indication that such checks were drawn on insufficient funds or that he was engaged in "kiting" them.

Petitioner seeks to avoid the effect of this conclusion as to the nature of his testimony by arguing that the testimony was used at the criminal trial as part of the Government's attempt to "establish the crime charged against the defendant as to Stout & Co.," by proving "a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as [proving] the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn" (Br. p. 18). In support of his contention he sets out in the Appendix to his Brief (Br. pp. 39–44) various isolated portions of the testimony, with interlineations to indicate their supposed relevance to his fraud on Stout & Co. The first difficulty with this argument is that there *was* no "crime charged against the defendant as to Stout & Co." The mailings charged—on the basis of which alone petitioner could have been convicted—related exclusively to fraud on Essex House and on Reynolds, and all occurred a year or more before the transactions with Stout & Co. Indeed, the Government was inferentially criticized by the court below for burdening the record with testimony so remote from the only crimes charged.[37]

---

[37] "Why the Government thought it necessary or desirable so greatly to lengthen the trial by the introduction of a mass of evidence relating to similar transactions we find difficult to understand in view of the completeness of its proof as to

Furthermore, even were the testimony as relevant as petitioner contends to the crimes charged in the indictment, it would still remain testimony which, at the time and under the circumstances of its original utterance, was in no sense incriminating. To hold that the introduction of such testimony in a later criminal case was precluded by the force of the immunity statute would entail as a logical corollary a holding that petitioner, by giving it, had secured immunity not merely from the use of the testimony, but from any prosecution at all on account of matters connected with it, at least in New York. We submit that no immunity statute can reasonably be given an effect so disastrous to criminal justice, and that petitioner's testimony given after March 14, 1938, involved no privilege for an immunity statute to avoid. It therefore was not compelled by virtue of any such statute, and the premise of petitioner's argument against its admissibility at the trial below must fail.

In any event, as we have already shown (*supra*, pp. 9–10), by his testimony voluntarily given prior to March 14, 1938, petitioner had convicted himself out of his own mouth of having been engaged, for seven months prior to July 1937, in the same

---

the Essex House and Reynolds transactions." (R. 49). As pointed out in the Statement, *supra*, p. 6, the jury at the trial was properly instructed that no conviction could be based upon the Stout & Co. transactions (Tr. 1485–1486).

check "kiting" scheme of which the transactions charged in the indictment were in furtherance. That testimony, as shown in Point I, was clearly admissible at his trial; and the significance of the admission of the later testimony was merely its cumulative effect, in relation both to the earlier testimony[28] and to the other evidence properly admitted at the trial. Consequently, even if the

---

[28] Petitioner contends (Br. pp. 18–19) that the later testimony cannot be regarded as cumulative in relation to the earlier for the reason that it concerned a later period of time, and also because it was taken, for the most part, in proceedings brought by entirely different judgment creditors. That might be true if it were being used for the same purposes as those for which it was elicited in the New York proceedings. But the cumulative character of the later testimony in respect of its use at the trial below is to be determined by reference to the purpose for which all the testimony was adduced at the trial below, and as of the time of the trial. The earlier testimony was not introduced for the purpose of enabling the jury to convict petitioner of the criminal conduct which such earlier testimony admitted, since the statute of limitations had run upon a prosecution for that conduct (*supra*, footnote 9, p. 10). It was introduced for its bearing upon the intent with which petitioner committed the acts charged in the indictment, which occurred in August 1937. The later testimony was introduced for exactly the same purpose. In view of the clear admissions contained in the earlier testimony, and of the other evidence set forth in the Statement (*supra*, pp. 6–12), the later testimony standing by itself could have added nothing, we submit, by which the jury conceivably could have been influenced in finding guilt. It was therefore merely cumulative in character.

Petitioner also contends (Br., pp. 20–21) that the giving of the earlier testimony did not serve as a waiver of constitutional immunity in respect of the later testimony. We have made no argument inconsistent with this view.

later testimony is regarded as incriminating, its admission at the trial could not have been prejudicial. The majority below therefore correctly concluded that, his earlier incriminating testimony having been properly admitted, his "later statements of October 1938 to September 1939 became mere cumulative reiteration of matters already abundantly proved, and cannot have had any substantial effect on the jury's verdict" (R. 54).[39]

III

EVEN THOUGH REGARDED AS COMPELLED BY AN IMMUNITY STATUTE, ALL OF PETITIONER'S TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS WAS NEVERTHELESS ADMISSIBLE AT HIS TRIAL

In Point I we have shown that petitioner's testimony given prior to March 14, 1938, although incriminating under state law, was not given pursuant to an immunity statute, since there was no such statute then applicable; and that, with the privilege against self-incrimination therefore available to him, he nevertheless did not assert it, and as a result must be deemed to have

[39] See also *People* v. *Boyd*, 67 Cal. App. 292, 297, 227 Pac. 783, 784 (1924): "The testimony of the defendant given upon the first trial contains no confession or admission tending to establish guilt. The introduction of the testimony to which objection is so strenuously made would seem to have served no useful purpose, and should therefore probably not have been admitted; yet, since it cannot be said to have been harmful to the rights of the defendant, it will not be a ground for reversal."

given his testimony voluntarily. In Point II we have shown that his testimony given after March 14, 1938, was not in fact incriminating and therefore evoked no privilege, so that the immunity statute which became effective on March 14, 1938, was as irrelevant to the later as to the earlier testimony. In Point II we have also shown that, in any event, the later testimony, viewed in its relation to the offenses of which petitioner was convicted, was merely cumulative and did not prejudice his substantial rights. We submit that the decision below should be affirmed upon these grounds, and that this case presents no question of the admissibility at a federal criminal trial of incriminating testimony compelled under a state immunity statute.

For the purpose of meeting directly petitioner's contentions, however, we shall assume, *arguendo*, that such a question is presented. On this assumption we submit, despite the comments of petitioner (Br. pp. 11–12, 13) and of the court below (R. 51, 52, 53) on the absence of controlling authority, that the unanimous decision of the same court in *Fuller* v. *United States*, 31 F. (2d) 747 (C. C. A. 2), certiorari denied, 280 U. S. 556, effectively disposes of petitioner's contentions here.

The defendant in the *Fuller* case had been required, by subpoena issued by the Attorney General of New York *pursuant to a statute con-*

taining a true immunity clause,[40] to produce books and records which belonged to him individually.[41] Except as affected by the state immunity statute he was protected by the state constitutional privilege against self-incrimination from being compelled to produce such books and records;[42] and he was likewise protected by the Fifth Amendment from any such compulsion at the hands of the United States.[43] The United States subpoenaed the books from the possession of the state Attorney General for use in a mail fraud prosecution of the defendant. The defendant there, like petitioner here, did not take the stand at his trial, and contended that the admission of the books in evidence was a violation

---

[40] Consolidated Laws of New York (Cahill), c. 21, § 359. The fact that this statute under which the books and records were subpoenaed contained an immunity clause does not appear in the reported opinion of the circuit court of appeals (31 F. (2d) 747); but it was brought to the attention of this Court in the petition for certiorari (No. 920, October Term 1928), which was denied (280 U. S. 556).

[41] Other books and records belonging to a corporation of which the defendant was treasurer were held not privileged, on the authority of *Wilson* v. *United States*, 221 U. S. 361.

[42] *People* v. *Hunter*, 249 N. Y. S. 66, 68 (Court of General Sessions, New York County, 1931); see *People* v. *Defore*, 242 N. Y. 13, 27 (1926): "A defendant is 'protected from producing his documents in response to a *subpoena duces tecum*, for his production of them in court would be his voucher of their genuineness.' There would then be 'testimonial compulsion' (*Haywood* v. *U. S.*, *supra* [268 Fed. 795, 802 (C. C. A. 7), certiorari denied, 256 U. S. 689])."

[43] *Boyd* v. *United States*, 116 U. S. 616, 618.

of his privilege against self-incrimination under the Fifth Amendment. The court, unanimously rejecting this contention, stated (31 F. (2d) at 748):

> All of these books and papers, however, were in the possession of the Attorney General of New York when they were taken by the government on subpoena. The privilege of the defendant was not broad enough to protect him from the production by others of his private books or papers, when they were found in the possession of a third party; but only prevented the voluntary production of them by himself while he had custody of them.

The case at bar is of course not to be distinguished on the ground that it involves oral disclosures rather than books or documents, since the federal and New York constitutional provisions alike embrace both forms of compelled incrimination.[14] The *Fuller* case involved all the elements that petitioner, in contending that his testimony was inadmissible, assumes are present here: (1) evidence of a type which in the absence of an immunity statute would be protected by the state constitutional privilege against self-incrimination, and which would be similarly protected by the Fifth Amendment were it applicable to the proceeding in which the evidence was elicited; (2) an

[14] Cases cited in footnotes 42 and 43, *supra*, p. 37.

immunity statute, authorizing compulsory production of the evidence in the state proceeding; and (3) use of the evidence at a federal criminal trial. In both cases the defendant objected to the use of the evidence at his federal criminal trial, but in both cases the evidence was introduced without the aid of any federal process compelling him either to testify to the incriminating facts or to produce the incriminating evidence.

The decision in the *Fuller* case was a direct application of principles established by decisions of this Court. This Court has extended the protection of the Fifth Amendment beyond that of the common-law privilege against self-incrimination, by holding that it is not limited to oral disclosures but also forbids compelling a person to produce self-incriminating documents belonging to him and in his possession.[45] But this Court has refused to extend the protection of the Amendment any further than this, and has held that by the Amendment a party "is privileged from producing the evidence but not from its production."[46] Thus, the title to and possession of incriminating books and papers of a bankrupt may be transferred, by operation of laws containing no immunity clause, to the trustee in bankruptcy, and they may in turn be procured from the trustee by

[45] *Boyd* v. *United States*, 116 U. S. 616, 618.

[46] *Johnson* v. *United States*, 228 U. S. 457, 458.

compulsory process for use as evidence in a criminal prosecution of the bankrupt, without violating the bankrupt's constitutional privilege under the Fifth Amendment.[47] This result being permissible where the whole of the procedure occurs in tribunals subject to the Fifth Amendment, it cannot seriously be contended that the result should be otherwise when the initial transfer was by operation of the laws of a state having a substantially identical constitutional privilege.[48] The *Fuller* case, thus strongly buttressed by decisions of this Court, is consistent with the essential nature of the privilege against self-incrimination.

That privilege applies primarily to *present testimonial* compulsion.[49] This statement of limitation upon its normal application does not mean that a government may reap the benefit of an antecedent violation of the privilege by its own tri-

---

[47] *Ex parte Fuller*, 262 U. S. 91, 93–94; *Johnson* v. *United States*, 228 U. S. 457, 458; *Matter of Harris*, 221 U. S. 274, 279–280. It is sufficient that the bankrupt has been divested of possession; that he retains title is insufficient to preserve the privilege. *Dier* v. *Banton*, 262 U. S. 147, 149–150.

[48] In *Dier* v. *Banton*, 262 U. S. 147, involving somewhat the converse situation, this Court affirmed an order refusing to enjoin the receiver of the estate of a bankrupt from delivering books and records to a state District Attorney pursuant to a state subpoena.

[49] 8 Wigmore, *Evidence* (3d ed. 1940), p. 363; *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, 59 (1856); *Haywood* v. *United States*, 268 Fed. 795, 802 (C. C. A. 7), certiorari denied 256 U. S. 689; *People* v. *Defore*, 242 N. Y. 13, 27 (1926).

bunals.[50] Where, however, there has been no such antecedent violation, but only lawful compulsion, the privilege has no application to the use against a defendant of his prior testimony, as distinguished from compelling him presently to testify. In England it was so decided nearly a century ago. The defendant in *Regina* v. *Scott,* Dearsly & Bell's Crown Cases 47 (1856), had been examined in bankruptcy pursuant to Section 117 of the Bankrupt Law Consolidation Act of 1849 (12 & 13 Vict., c. 106). A transcript of his testimony so given was admitted in a later criminal prosecution for mutilating one of his trade books. On the appeal it was held that, notwithstanding the common law privilege against self-incrimination, the statute lawfully required the bankrupt to answer relevant questions touching "his trade, dealings, or estate, although the answer may tend to show that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy" (*ibid.,* 56). Consequently, the transcript was held admissible. Speaking for the court Lord Campbell, C. J., stated (*ibid.,* 59):[51]

> The accusation of himself was an accomplished fact, and at the trial he was

[50] *Tuttle* v. *People*, 33 Colo. 243 (1905); *State* v. *Young*, 119 Mo. 495 (1894); *State* v. *Hoffman*, 53 S. D. 182 (1928); see *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, 59 (1856). *Regina* v. *Garbett*, 2 Carrington and Kirwan 474 (1847), relied upon by petitioner (Br., pp. 27–28), merely applies this principle.

[51] Coleridge, J., dissented (*ibid.*, pp. 60–67).

> not called upon to accuse himself. 'The maxim relied upon ["*nemo tenetur se ipsum accusare*"] applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded when the question was lawful and the party examined was bound by law to answer it.

To a further argument that the testimony constituted a coerced confession and as such was inadmissible in evidence, Lord Campbell replied (*ibid.*, 58):

> It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding.

Regina v. *Scott* represents the present law of England,[52] and we submit that its doctrine is ap-

[52] *Regina* v. *Robinson* (1867), L. R. 1 C. C. 80, 10 Cox Cr. 467; *Regina* v. *Erdheim* (1896), 2 Q. B. 260, 267; 3 Wigmore, *Evidence* (3d ed. 1940), p. 310. See also *Rex* v. *Harcourt*

plicable here. The common law privilege against self-incrimination in that case controlled the criminal proceeding at which the incriminating testimony was offered in evidence as much as the Fifth Amendment controlled the trial in the present case. In *Regina* v. *Scott* the court, not invading but upholding the privilege, held that the incriminating testimony was admissible since it was originally compelled lawfully. In this case, the incriminating testimony, if compelled at all in the state proceedings, was likewise compelled lawfully. The lawfulness of the prior compulsion, on which the decision in *Regina* v. *Scott* turned, is as clearly present here as it was there.[53]

(1930), 3 D. L. R. 59, 62 (Ontario Supreme Court, 1929) (the principle "that no one is bound to accuse himself * * * is directed to the fact of the giving of the evidence and not to the use which may be afterwards made of that evidence on subsequent proceedings"); *Rex* v. *Graham*, 21 D. L. R. 513 (Alberta Supreme Court, 1915).

[53] Indeed, the use of the testimony at the trial below did not carry even the taint of unlawful state or private action which this Court has held does not preclude the admission at a federal trial of evidence secured by an unconstitutional search and seizure committed by state officers, or secured by the trespass of private individuals. *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465; *Byars* v. *United States*, 273 U. S. 28, 33: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *McGuire* v. *United States*, 273 U. S. 95, 99; *Schroeder* v. *United States*, 7 F. (2d) 60 (C. C. A. 2); *United States* v. *One Ford Coupe*, 3 F. (2d) 64 (W. D. La.); cf. *Olmstead* v. *United States*, 277 U. S. 438; and see *Gambino* v. *United States*, 275 U. S. 310, 317.

We believe that the scarcity of directly controlling authority is attributable to the fact that between 1868 and 1910 a federal statute forbade the use against a defendant in federal criminal proceedings of any pleadings or evidence obtained from him "by means of a judicial proceeding in this or any foreign country,"[54] and to the further fact that courts, legislatures, and the bar alike have taken it for granted that testimony of the character here involved is admissible in evidence in the absence of such a statutory prohibition. The statute referred to was never supposed to be a mere declaratory statement of the constitutional privilege against self-incrimination. Instead, it was part of the one-time trend of Congress and numerous state legislatures to restrict the privilege by providing in its place that compelled incriminating testimony may not be used against the witness in a criminal prosecution.[55] Some courts had held that statutes of

[54] Act of February 25, 1868, 15 Stat. 37 (R. S. 860); repealed by Act of May 7, 1910, c. 216, 36 Stat. 352.

[55] In recommending its repeal the Attorney General in his Annual Report for 1909, pp. 22–23, stated: "In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of *Counselman* v. *Hitchcock* (142 U. S. 547) held that this section was no substitute for the constitutional guaranty against self-incrimination. As a result it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding. * * *" See also the discussion in the dissenting opinion in *United States* v. *Monia*, 317 U. S. 424, 432–442.

this sort provided an adequate substitute for the privilege, and therefore justified the compulsion of otherwise incriminating testimony.[56] But since the decision of this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, it has been accepted that such statutes not only do not meet the needs of the constitutional privilege against self-incrimination, but serve themselves as stumbling blocks to the effective and fair administration of criminal law.[57] Yet if petitioner's argument is sound—i. e. that even lacking such a statute incriminating testimony compelled in one jurisdiction is inadmissible in a criminal trial in another—it would follow not only that the Act of 1868 was unnecessary when enacted, rather than inadequate as held by this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, but also that Congress was misled as to the reasons for repealing it.[58] While recog-

---

[56] *State* v. *Quarles*, 13 Ark. 307 (1853); *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74 (1861) (overruled in *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903), in conformity with *Counselman* v. *Hitchcock*, 142 U. S. 547).

[57] The statute was repealed because it "possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice." See H. Rep. No. 266, 61st Cong., 2d sess., pp. 1–2; see also S. Rep. No. 502, 61st Cong., 2d sess.; 45 Cong. Rec. 2251–2253, 5764–5765.

[58] That is, from petitioner's contention it would follow that R. S. 860, as applied to previously compelled testimony, would have been declaratory of the constitutional requirement, and that its repeal would have left the latter unaffected. It may be argued that the repeal may still have sufficient significance as applied to testimony voluntarily given in a prior proceeding. But from petitioner's premise that his

nizing that change and growth in constitutional doctrine are both appropriate and essential, we nevertheless submit that this constitutional provision should not be invested with a meaning which is so contrary to the basic assumptions of both courts and legislatures throughout our constitutional history.[39]

In fact petitioner is seeking to attribute to an immunity statute a result which, if achieved, would logically extend to situations where no immunity statute is either involved or necessary to secure the testimony. For by hypothesis testimony that when given is not incriminating, or else is incriminating only in such a remote sense as not to evoke any privilege, is compellable by both state and federal governments without the aid of immunity statutes; and testimony that is incriminating only under the laws of another government is likewise compellable without the aid of such a statute. A premise of petitioner's

testimony was involuntary because he was unable to claim his federal privilege in the state proceedings, it would follow that incriminating testimony given in a state proceeding is never to be regarded as voluntary when offered in evidence at a federal trial. We therefore believe that it is a necessary implication of petitioner's position that both the enactment and the repeal of R. S. 860 were based on a complete misunderstanding of the privilege against self-incrimination.

[39] See William Howard Taft, *The Administration of Criminal Law*, 15 Yale L. Journ. 1, 8–11 (1905); *Model Code of Evidence* (American Law Institute, 1942), Foreword by Edmund M. Morgan, p. 23; Rule 201 (3) and Comment; Rule 233 and Comment.

reasoning is that he was unable to assert his federal privilege in the state proceedings, and that the first time he was in a position to do so was at the trial below (Br., p. 24). Yet this would still be true had no state immunity statute been involved; and the situation of one being trapped "between the interstices of the overlapping state and federal sovereignties" is in no sense the unique result of an immunity statute. It may arise between state and federal governments although neither should have such a statute; it is paralleled by the situation with respect to a bankrupt's books and papers that may exist under the laws of a single sovereignty (*supra*, pp. 39–40); and it may be paralleled wherever one state seeks to make use of testimony given under the compulsion of the laws of another state whether with or without the aid of an immunity statute.[60] As

[60] Indeed, such a result is a necessary corollary of the rule that the privilege against self-incrimination applies only to answers which are incriminating under the laws of the jurisdiction exercising the compulsion. See cases cited *supra*, in footnote 15. Petitioner contends that the present case represents the actual occurrence of what this Court regarded as a remote possibility in *Brown* v. *Walker*, 161 U. S. 591, and in *Jack* v. *Kansas*, 199 U. S. 372 (Br., pp. 10, 11). However, the controlling decision is *United States* v. *Murdock*, 284 U. S. 141, 148, in which this Court did not base the rule in question upon the remoteness of the possibility of prosecution under the laws of another jurisdiction. In view of the multitude of acts which may constitute criminal conduct under the laws of other jurisdictions, which are not within the judicial knowledge of the court taking testimony, we submit that no other rule than that recognized in *United States* v. *Murdock* is practicable.

already pointed out, all kinds of testimony, considered by no one to be incriminating when given, may subsequently provide background material for proof of crime. In short we believe that petitioner's contentions, though premised on the assumption that his testimony was compelled by an immunity statute, are necessarily of much broader application and involve a proposition that the admission in evidence against a criminal defendant of testimony previously given by him in another proceeding is the equivalent in all respects of compelling him presently to testify, and is therefore never permissible.

Moreover, to accept petitioner's contention would cast doubt upon the admissibility in evidence against criminal defendants of various classes of legally required reports, such as income tax returns,[61] which are not even the product of testimonial compulsion and yet, like the recorded evidence here involved, are of exceptional trustworthiness. The privilege against self-incrimination has not been interpreted to forbid the compelled production of all evidence that conceivably may prove useful in a criminal prosecution. It has not been interpreted to excuse people from

[61] Held admissible in *Shushan* v. *United States*, 117 F. (2d) 110, 117 (C. C. A. 5), certiorari denied, 314 U. S. 706; cf. *United States* v. *Sullivan*, 274 U. S. 259, 263–264; see *Ryan* v. *Amazon Petroleum Corp.*, 71 F. (2d) 1, 8 (C. C. A. 5), reversed on another ground, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

keeping records or making reports that the law requires. The making of a record or report may be properly compelled by a law previously in existence which serves administrative purposes and is not directed to the production of incriminating evidence as such, even though after being made the record or report becomes public property to which no constitutional privilege attaches although it turns out to have a bearing upon a subsequent charge of crime.[22] The present case,

---

[22] *Ule* v. *State*, 208 Ind. 255 (1935); *State* v. *Cummins*, 76 Ia. 133, 136 (1888); *State* v. *Smith*, 74 Ia. 580, 584 (1888); *People* v. *Rosenheimer*, 209 N. Y. 115, 120 (1913); *State* v. *Donovan*, 10 N. D. 203 (1901); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.); *United States* v. *Dalton*, 286 Fed. 756, 757 (W. D. Wash.); see *Wilson* v. *United States*, 221 U. S. 361, 380–382; 8 Wigmore, *Evidence* (3d ed., 1940), sec. 2259, pp. 349–352: "The duty, or compulsion, is directed * * * to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. * * * The generalization, therefore, may be made, that *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting.* Such records therefore are not protected by the present privilege against self-incrimination. * * * The foregoing logic leads to the same result where the report required by law to be made is *oral* only; *e.g.*, those laws which require a person whose *vehicle*, machinery, or other property has *caused an injury, to make an oral disclosure* to an official, at the *time*, of his name and address or of other circumstances of the injury. The *logic* is the same; for here also the purpose is administrative, the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and

on the assumption that the testimony was in fact compelled, should be governed by the same principles. Petitioner was under a statutory duty in New York to supply information in aid of his judgment creditors. This duty was anterior to and independent of the criminal conduct of which he now stands convicted; it related to a generic class of acts and not to criminal conduct as such; the disclosure of crime was not the purpose of the proceeding but was only the incidental result; there is no suggestion of collusion between petitioner's judgment creditors and the United States Attorney; petitioner's testimony was in effect an oral report which became the property of the state of New York; and we submit, he has no federal constitutional privilege against the production, by process not directed to him, of the document, not belonging to him or in his possession, which contains such testimony. To reach a contrary conclusion would be, we submit, to exalt the privilege against self-incrimination, without justification in reason or authority, to a hitherto unattained pinnacle, at the expense of

---

it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding, and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality." [Italics the author's.]

the public interest in the proof of crime by trustworthy evidence legally procured."

It follows that, even though the case be viewed as presenting the specific question of the admissibility at a federal criminal trial of incriminating testimony secured from the defendant under the compulsion of a state immunity statute, the decision of the majority below is nonetheless correct.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

CHARLES FAHY,
Solictor General.

TOM C. CLARK,
Assistant Attorney General.

CHESTER T. LANE,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

DECEMBER 1943.

---

[a] Citing this Court's decision in *Heike* v. *United States*, 227 U. S. 131, the court in *People* v. *Lorch*, 13 N. Y. S. (2d) 155, 160–161 (Court of General Sessions, New York County, 1939), construes an immunity statute strictly and states: "While the court has no concern with the wisdom or propriety of legislation, it should not strain to reach a result, fraught with so serious and grave a danger to the due administration of the criminal law."

U. S. GOVERNMENT PRINTING OFFICE: 1943

pp. 5+6, 2, 3,

SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1943.

Samuel Feldman, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 29, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an indictment under Section 215 of the Criminal Code, 18 U. S. C. § 338, for using the mails to further a fraudulent scheme. Petitioner's conviction was affirmed by the Circuit Court of Appeals, one judge dissenting. 136 F. 2d 394. We brought the case here, 320 U. S. 724, to consider the single question whether the admission of testimony previously given by petitioner in supplementary proceedings in a state court deprived him of the protection of the Fifth Amendment against being "compelled in any criminal case to be a witness against himself".

In accordance with New York procedure, known as supplementary proceedings, designed to aid in the discovery of assets of a debtor, N. Y. Civil Practice Act, art. 45, Feldman, a judgment debtor, was called as a witness in such proceedings on several occasions between March 31, 1936, and September 29, 1939. Up to March 14, 1938, the New York immunity statute merely provided that a debtor might not be excused from testifying because of self-crimination but that his testimony could not be used in evidence in a subsequent criminal proceeding against him. N. Y. Laws, 1935, c. 630, § 789. By an Act of March 14, 1938, New York broadened the debtor's immunity so as to free him from prosecution on account of any matter revealed in his testimony. N. Y. Laws, 1938, c. 108, § 17; N. Y. Civil Practice Act, § 789. While the earlier provision was in effect, Feldman testified that he was unemployed, paid rent of $250 a month from funds supplied by his family, owed about $340,000 and contemplated immediate bankruptcy. He further testified that about once a month his father sent him a book of signed checks, he sent large sums of money to

his father by Western Union and destroyed whatever evidence the receipts might offer—in short, that he was "kiting" his father's checks by sending the proceeds of the later checks to cover those cashed earlier. After March 14, 1938, and down through September, 1939, Feldman again testified in New York supplementary proceedings, giving further details of his bizarre "kiting" practices.

The federal charge was the use of the mails in a scheme to defraud executed by "kiting" checks. In the trial, the Government introduced Feldman's testimony in the New York supplementary proceedings. He did not take the stand. The Government contends that it is unnecessary to decide whether the claim of privilege duly made bars the admission of this testimony. It suggests that testimony given prior to the Act of March 14, 1938, was not compellable and therefore Feldman waived any privilege, in that the New York statute prior to March 14, 1938, did not grant an immunity coextensive with the privilege available under New York law. *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253. As to testimony under the later New York statute, the Government suggests that it either was not incriminating or was merely repetitive of the earlier voluntary testimony, making its admission in any event not prejudicial.

We put to one side all these subtler issues because we think they cannot dispose of the case. And so we come directly to the main question, namely whether the Fifth Amendment prohibited the admission against Feldman upon his trial in a federal court of the earlier testimony given by him in the state courts. While the point has not been formally decided, we deem the answer to be controlled by a long series of decisions expressing basic principles of our federation.

The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy. "The efforts of the courts and

See Boyd v. United States 116 U.S. 616, 630.

their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks* v. *United States*, 232 U. S. 383, 393. "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States*, ~~116 U. S. 616, 633~~, supra, at 633.

But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. *Brown* v. *Walker*, 161 U. S. 591, 606; *Jack* v. *Kansas*, 199 U. S. 372, 380; *Twining* v. *New Jersey*, 211 U. S. 78. Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment", *Ponzi* v. *Fessenden*, 258 U. S. 254, 261, of Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the

judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye."

This principle has governed a series of decisions which for all practical purposes rule the present case. When this Court for the first time sustained an immunity statute as adequate, it rejected the argument that because federal immunity could not bar use in a state prosecution of testimony compelled in a federal court, the immunity falls short of the constitutional requirement. *Brown* v. *Walker, supra* at 606. And when the reverse claim was made as to a state immunity statute, that a disclosure compelled in a state court could not assure immunity in a federal court, the argument was again rejected because "The state [anti-trust] statute could not, of course, prevent a prosecution of the same party under the United States [anti-trust] statute, and it could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute, if it could be imagined that such prosecution would be instituted under such circumstances." *Jack* v. *Kansas, supra* at 380. When the matter was here last it was thus summarized: "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." *United States* v. *Murdock*, 284 U. S. 141, 149.

And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution. *Weeks* v. *United States, supra*; *Gouled* v. *United States*, 255 U. S. 298; *Agnello* v. *United States*, 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell*, 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. "If

knowledge of them [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . . ." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co.* v. *United States*, 282 U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars* v. *United States*, 273 U. S. 28.

The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. There is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers. The Government here is not seeking to benefit by evidence which it extorted. It had no power either to compel testimony in the state court or to forestall such disclosure as a means of avoiding possible interference with the enforcement of the federal penal code. Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. It has seen fit to make the exchange very sparingly. See *United States* v. *Monia*, 317 U. S. 424. Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution "for or on account of any transaction, matter or thing concerning which" a New York court may have seen fit to require testimony. Such would be the practical result of sustaining petitioner's claim. The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the Government. See Nardone v. United States, 308 U. S. 338.

Only a word need be said about the phrase of scepticism in *Jack* v. *Kansas, supra* at 380, that it could hardly be imagined "that such prosecution would be instituted under such circumstances." The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal anti-trust laws. But see *Fox* v. *State of Ohio*, 5 How. 410, 435; *United States* v. *Lanza*, 260 U. S. 377. The cautionary words in *Jack* v. *Kansas* in nowise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions. There are, as we have already seen, ample safeguards. If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, *supra*, as well as that of *McNabb* v. *United States*, 318 U. S. 332, afford adequate resources against such an evasive disregard of the privilege against self-crimination. Nothing in this record brings either doctrine into play.

Judgment affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

In *Boyd* v. *United States*, this Court said that "any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S. 616, 631-632.[1] Unless the Court now is disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be

[1] And, see Jack v. Kansas, 199 U. S. 372, where this Court disposed of an argument that a Kansas statute unconstitutionally compelled Jack to confess his violations of a federal criminal statute with the assertion that, "We do not believe . . . such evidence would be availed of by the Government for such purpose." *Id.*, 381-382. In an earlier case, Brown v. Walker, 161 U. S. 591, this Court thought that the likelihood that state prosecutors would use testimony compelled by the federal government was "so improbable that no reasonable man would suffer it to influence his conduct." *Id.*, 606-608. But see Ensign v. Pennsylvania, 227 U. S. 592.

See United States v. Saline Bank, 1 Pet. 100; United States v. McRae, L. R. 3 Ch. App. 79.

considered "shocking to the universal sense of justice" and "offensive to the common and fundamental ideas of fairness and right", and therefore, under past decisions of the Court, incompatible with Constitutional due process of law. *Betts* v. *Brady*, 316 U. S. 455, 462, 473. Or at least, even if the use of testimony extracted by compulsory discovery be held consistent with due process, adherence to the belief expressed by the *Boyd* case should require the Court to hold that, absent a conflicting Act of Congress, "a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence" so obtained. *McNabb* v. *United States*, 318 U. S. 332, 347. But I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. The Bill of Rights, proposed in 1789 by the First Congress convened under our Constitution, and quickly ratified by the States in 1791, declares in part that, "No person . . . shall be compelled in any Criminal Case to be a witness against himself." Amend. V, Constitution of the United States. Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now.

Feldman was compelled to testify under oath in a creditors' compulsory discovery proceeding in a New York court conducted pursuant to a state statute which granted him immunity from state prosecution for any state crime he might be forced to confess. Had he refused to testify he could have been imprisoned. Over his objection, a transcript of his compelled testimony was used in the United States District Court to convict him of a federal crime. As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court.[2] This would have been true whether the federal court proceeding had been non-criminal or criminal,[3] and whether Feld-

[2] McCarthy v. Arndstein, 266 U. S. 34; and see Bram v. United States, 168 U. S. 532; Wan v. United States, 266 U. S. 1; cf. Boyd v. United States, 116 U. S. 616.

[3] McCarthy v. Arndstein, *supra*, Note 2, pp. 40-41; Counselman v. Hitchcock, 142 U. S. 547, 562. See also United States *ex rel.* Bilokumsky v. Tod, 263 U. S. 149; United States *ex rel.* Vajtauer v. Comm'r of Immigration, 273 U. S. 103.

man had testified as a mere witness or as a defendant.[4] Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room;[5] by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas;[6] or by state officers interrogating a suspect for the purpose of enforcing a federal law.[7] There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it "must have a broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562; *McCarthy* v. *Arndstein*, 266 U. S. 34.

Today, however, the Court adopts a different approach to the task of construing the Fifth Amendment. We are now told that under certain circumstances compelled testimony is purged of the fatal taint which the Fifth Amendment places upon it, and that an accused can be convicted in a federal court on words he was forced to speak. The circumstances under which it is now held that men can be forced to convict themselves by their own testimony are, (1) that the testimony was compelled by state officers, and (2) that the state officers were not acting to enforce federal law. These slight variations in the techniques of compulsion are considered a sufficient excuse to escape the Fifth Amendment's command against the use of compelled testimony by federal courts. Surely such a holding is not to be justified by the language of that Amendment. Within its sweeping prohibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling, whether by threats of imprisonment, physical torture, or other means. Testimony is no less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.

---

[4] Counselman v. Hitchcock, 142 U. S. 547.

[5] Wan v. United States, *supra*, Note 2; Anderson v. United States, 318 U. S. 350, 356.

[6] Bram v. United States, *supra*, Note 2;

[7] Anderson v. United States, *supra*, Note 5; and see Bram v. United States, *supra*, Note 2.

Nor is the holding in this case to be defended as one which our federal system requires. This case presents no conflict between federal and state spheres of power such as that presented by cases involving the validity of federal and state immunity statutes, wherein it has been contended, unsuccessfully, that neither the United States nor a State can compel a witness to testify against himself unless it grant him complete immunity from prosecution in both jurisdictions.[8] Feldman's objection to the use of his compelled testimony is not based on a claim that New York must grant him, or has granted him, immunity from prosecution for the federal crime it has forced him to confess. He does not question the power of the United States to prosecute him for that crime on proper evidence. Nor, for that matter, does he contend that the Fifth Amendment prevented New York from compelling him to confess a federal crime.[9] He claims only that the Fifth Amendment's prohibition against self-incrimination prevents the use of his compelled testimony against him in the present proceeding. The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will. The Court's holding that a defendant can be so convicted cuts into the very substance of the Fifth Amend-

[8] See Hale v. Henkel, 201 U. S. 43, and United States v. Murdock, 284 U. S. 141, holding it enough that the United States grant immunity from prosecution for federal crimes; but see, *contra*, United States v. Saline Bank, 1 Peters 100; Ballmann v. Fagin, 200 U. S. 186. Had the Court in the *Murdock* case, *supra*, accepted the contention that the federal government must grant an immunity from state as well as federal prosecution, it would inevitably have been faced with the problem of the federal power to interfere with enforcement of state laws through the device of granting immunity from state prosecution to witnesses in federal proceedings—a problem replete with both practical and legal difficulties. See J. A. C. Grant, Immunity From Compulsory Self-Incrimination In A Federal System of Government, 9 Temple L. Q. 57 and 194, 207-211.

Compare Jack v. Kansas, *supra*, Note 1, holding that Kansas could compel a witness to testify to his past crimes upon a grant of immunity from state prosecution, though he still be subject to federal prosecution. In reaching this result the Court took specific notice of the fact that, were the rule otherwise, state immunity statutes must all be stricken down. "The state statute could not, of course, prevent a prosecution of the same party under the United States statute." 199 U. S. 372, 380.

[9] See Twining v. New Jersey, 211 U. S. 78, and Ensign v. Pennsylvania, *supra*, Note 1, holding respectively that despite the Fourteenth Amendment a state may compel a defendant to incriminate himself, and may use against him schedules he filed in an involuntary federal bankruptcy proceeding. But see Asheraft v. Tennessee, No. 391, decided May 1, 1944.

ment. And it justifies this result not by the language or history of the Constitution itself, but by a process of syllogistic reasoning based upon broad premises of "dual sovereignty" stated in previous opinions of the Court relating to immunity statutes. Even were there here a "dual sovereignty" problem, which there is not, such a method of decision would be questionable. Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the United States Reports. "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, concurring opinion, 487, 491-492.[10]

Putting aside the Court's dialectical method of interpretation, and examining the history and purpose of the Fifth Amendment, there appears to be no justification for reducing its scope as the Court is now doing. Compulsion of self-incriminatory testimony by court oaths and by the less refined methods of torture were equally detested by the Fifth Amendment's liberty-loving advocates and their forbears.[11] Their abhorrence of these practices did not spring alone from a predilection for personal privacy. They had other reasons to despise and fear them. They still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies which had brought religious and political non-conformists within the penalties of the law by means of their own testimony. And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the *extraction* of an accused's testimony as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. Few persons would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled

[10] For a critical analysis of the conflict between the legal concept of "dual sovereignty" and preservation of the Constitutional prohibition against self-incrimination, see J. A. C. Grant, *op. cit., supra*, Note 8.

[11] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763, 775-783.

testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant.[12]

Perhaps, as some have argued, the men who framed this Amendment were mistaken or their fears have lost foundation and the unqualified prohibition against the extraction and use of compelled testimony which they put into the Fifth Amendment should be repealed or modified.[13] This view of the desirability of constricting the Fifth Amendment I am not ready to accept, but were it otherwise I would not consider such a view should play any part in the process of interpretation. I am unwilling to see any constriction of the liberties and the procedural safeguards of these liberties specifically enumerated in the Bill of Rights unless it be by Constitutional amendment.[14]

The prohibition against compelled testimony which the Court today has seen fit to restrict cannot be dissociated from the other specific protections afforded the individual by the Bill of Rights. The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected representatives with unlimited powers of control over the individual. From their distrust was derived the first ten amendments, designed as a whole to "limit and qualify the powers of Government", to define "cases in which the Government ought not to act, or to act only in a particular mode", and to protect unpopular minorities from oppressive majorities. 1 Annals 437. The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that

[12] See United States v. Burr, 25 Fed. Cas. 38-41; Counselman v. Hitchcock, 142 U. S. 547, 564-566; Brown v. Walker, 161 U. S. 591, 594, 600, 605-606; cf. Ex parte Lange, 18 Wall. 163, 173. And see Pittman, *op. cit.*, *supra*, Note 11; and cases cited Notes 5, 6, and 7, *supra*.

[13] Compare Knox, Self-Incrimination, 74 Univ. Pa. L. Rev. 139 with VIII Wigmore on Evidence, Third Ed., pp. 304-313; and see Editorial, 1 Journ. Crim. Law and Crim. 165-166.

[14] See dissenting opinion of Circuit Judge Frank, in United States v. St. Pierre, 132 F. 2d 837, 840, pp. 847-848. "Strangely enough, those who are most opposed to any changes in judicial constructions of those designedly elastic clauses of the Constitution are often the most vigorous in their demands that the courts should eviscerate the specific and relatively inelastic self-incrimination clause." *Id.*, 848.

the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.

But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to "due process", by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights.[15] If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished. And one of the specific procedural safeguards which they inserted to shield the individual was the prohibition against compulsion of self-incriminatory testimony.

It is impossible for me to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with the principle of broad construction which this Court heretofore has deemed essential to full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. The protections explicitly afforded the individual by the Bill of Rights represent a large part of the characteristics which distinguish free from totalitarian government. Under our Constitutional system the privileges it embodies and the rights it secures

[15] See Chambers v. Florida, 309 U. S. 227, 235-238; Tot v. United States, 319 U. S. 463, 473.

were intended to be above and beyond the power of any branch of government to mutilate or destroy. We have no assurance that the fears of those who drafted and adopted our Bill of Rights were groundless, nor that the reasons for those fears no longer exist. Ancient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed.

This case involves the Fifth, not the Fourth, Amendment. Decisions which have read the Fourth and Fifth Amendments together for the purpose of broadening the Fourth Amendment should not now be employed to narrow the Fifth Amendment. To do so ignores the particular reasoning of these decisions as well as the separate language and history of the two Amendments. See *Boyd* v. *United States, supra; Counselman* v. *Hitchcock, supra; Brown* v. *Walker*, 161 U. S. 591; VIII *Wigmore on Evidence*, Third Ed. pp. 276-304, 368. Nothing this Court has said with regard to the Fourth Amendment requires that we now open the door which the Fifth Amendment in 1791 closed to compelled self-incrimination.

I would reverse the judgment.

Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this opinion.